Jurisdictional Statement

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81-1324

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MEADE H. ESPOSITO,

Defendant-Appellant,

v.

ROBERT ABRAMS,

Plaintiff-Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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Question Presented

Where a statute specifically enumerates certain political party officers and prohibits persons holding such offices from engaging in certain business activities, may a court broaden the scope of the statute by applying it to a person who, although not holding one of the enumerated offices, might be determined to function similarly to one of those officers enumerated without infringing the due process proscription on vague and overlybroad laws?

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Opinions Below

The Court of Appeals of the State of New York affirmed the Appellate Division decision without opinion. (A1)[1] The opinion of the Appellate Division of the Supreme Court, First Department, granting the defendant-appellant Esposito permission to appeal to the Court of Appeals is reported only in the official reports at 76 A.D. 2d 764 (1st Dept. 1980). The opinion of the Appellate Division, First Department, reversing the trial court's dismissal of the complaint is reported at 75 A.D.2d 528, 426 N.Y.S.2d 770 (1st Dept. 1980). (A2) The opinion of the Supreme Court of the State of New York, County of New York, dismissing the complaint in this action was not reported. (A7)

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[1] References to the Appendix to this Jurisdictional Statement will hereafter be designated by an "A" preceding the page number of the appendix.

Jurisdiction

This is an appeal from a decision of the highest court of the State of New York which affirmed a decision of the intermediate appellate court upholding the constitutionality of a state statute. The Court of Appeals affirmed the decision of the Appellate Division, without opinion, on October 15, 1981. (A1) The defendant served a notice of appeal to the Supreme Court of the United States on November 16, 1981. (A16) On November 19, 1981, the notice of appeal was filed in the Court of Appeals of the State of New York. (A15) Jurisdiction is based on 28 U.S.C. §1257(2).

Constitutional and Statutory Provisions Involved

U.S. Const. amend. XIV, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.Y. Unconsolidated Laws, §8052 (McKinney 1979):[2]

> Prohibition of interest by public officers, public employees and party officers in pari-mutuel racing activities
>
> 1. No public officer, public employee or party officer shall:
>
> (a) hold any license from the state racing commission, the state harness racing commission or the quarter horse racing commission; or
>
> (b) own or hold, directly or indirectly, any proprietary interest, stock or obligation of any firm, association or corporation (1) which is licensed by any of such commissions to conduct pari-mutuel racing, or (2) which is licensed to conduct its occupation, trade, or business at race tracks at which pari-mutuel race meets are conducted, or (3) which owns or leases to any licensed association or corporation a

[2] § 8052 of the Unconsolidated Laws was amended, effective July 1, 1980, but since the amended complaint was served in April of 1979 all references will be to the pre-amendment law as set forth above.

race track at which pari-mutuel racing is conducted, or (4) which participates in the management of any licensee conducting pari-mutuel racing; or

(c) hold any office or employment with any firm, association or corporation specified in paragraph (b) of this subdivision; or

(d) sell (or be a member of a firm, or own ten per centum or more of the stock of any corporation, which sells) any goods or services to any firm, association or corporation specified in paragraph (b) of this subdivision.

2. Notwithstanding any other provision of law, and in addition to any other cause of removal provided by law, a knowing and wilful violation of this section shall be cause for removal from public office, public employment or party office. In any such case, such public officer, public employee or party officer violating this section shall be removed from office by appropriate authority having the power of removal or at the suit of the attorney-general.

3. As used in this section, the following terms shall mean and include:

(a) Public officer. Every state and local officer as defined in section two of the public officers law who is required to devote all or substantially all of his time to the duties of his office for which he receives compensation, or if employed on a part time or other basis receives compensation in excess of eight thousand dollars per annum, a member or officer of the state legislature, a member or officer of the state racing commission, the state harness racing commission or the quarter horse racing commission, or a member of a local legislative body.

(b) Public employee. Every person employed by the state or any municipality or other political subdivision thereof or by a local legislative body (other than a public officer defined in paragraph (a) of this subdivision) who is required to devote all or substantially all of his time to the duties of his employment for which he receives compensation, or if employed on a part time or other basis receives compensation in excess of eight thousand dollars per annum, or an employee of the state legislature.

(c) Party officer. The following members or officers of any political party:

(1) A member of a national committee;

(2) A chairman, vice-chairman, secretary, treasurer or counsel of a state committee, or member of the executive committee of a state committee;

(3) A county leader, chairman, vice-chairman, counsel, secretary or treasurer of a county committee.

(d) Local legislative body. The board of supervisors of a county; the council, common council or board of aldermen and the board of estimate, the board of estimate and apportionment or board of estimate and contract, if there be one, of a city; and the town board of a town.

4. A public officer, public employee or party officer who owns or holds, directly or indirectly, any proprietary interest, stock or obligation prohibited by subdivision one of this section on May first, nineteen hundred fifty-four, shall not be in violation of this section if such interest or obligation is disposed of within one year from the date this act takes effect.

5. The state racing commission, the state harness racing commission or the quarter horse racing commis-

sion shall have the power to refuse to grant or to revoke or suspend a license of any firm, association or corporation which aids or knowingly permits or conspires to permit any public officer, public employee or party officer to acquire or retain any interest prohibited by this section.

6. The provisions of paragraph (c) of subdivision one of this section shall not apply to a public employee (other than a police officer or paid employee of a police department, sheriff's office, district attorney's office or other state or local enforcement agency) whose compensation is less than twenty-one thousand dollars per annum, provided, however, that employment of employees of a political subdivision may be prohibited by ordinance, resolution or local law adopted by the local legislative body or other governing board of such political subdivision.

7. The provisions of paragraph (a) of subdivision one of this section shall not bar a public officer, public employee or party officer from holding any license issued by the state racing commission, the state harness racing commission or the quarter horse racing commission if he was qualified to hold such a license on or prior to April sixth, nineteen hundred fifty-four.

8. Notwithstanding any inconsistent provisions of this chapter, the provisions of paragraph (a) of subdivision one of this section shall not bar a person employed by a school district, the state university of New York or a community college from holding a license issued by the state racing commission, the state harness racing commission or the quarter horse racing commission.

Statement of the Case

Proceedings Below

The amended complaint forming the basis of this action was served on the defendant-appellant (hereinafter "the appellant"), Meade Esposito, on April 4, 1979. (A21) The appellant moved for dismissal of the complaint pursuant, *inter alia*, to New York Civil Practive Law and Rules §3211(a)(1). The plaintiff-appellee (hereinafter "the appellee") responded and the defendant replied. By decision dated July 16, 1979, Justice Alvin F. Klein, Justice of the Supreme Court of the State of New York, New York County, dismissed the complaint. (A7) An order and judgment was entered. (A11; A13)

The appellee appealed to the Appellate Division, First Department, and the appellant filed his opposing brief. On April 18, 1980, the Appellate Division reversed the decision of Special Term. (A5) The appellant then moved for reargument and, in the alternative, for permission to appeal to the Court of Appeals. The appellee opposed this motion. On June 10, 1980, the Appellate Division granted permission to the appellant to appeal to the Court of Appeals. (A17)

The appellant appealed to the Court of Appeals and the appellee filed an opposing brief. The Court of Appeals affirmed the decision of the Appellate Division, without opinion. (A1)

Statement of Facts

The complaint which forms the basis of the present action seeks the same relief in five causes of action: to wit, that the appellant Esposito be caused to forfeit the office of "County Leader of Kings County" pursuant to section

8052 of the Unconsolidated Laws. Section 8052 of the Unconsolidated Laws prohibits, *inter alia*, enumerated party officers from having any interest in pari-mutuel racing activities. The appellee alleged that the appellant had violated this statute because Mr. Esposito owned more than ten percent of the stock of Serres, Visone & Rice, Inc., an insurance brokerage firm, and that this firm had obtained insurance policies for a licensee of the New York State Racing and Wagering Board. (A21)

The appellant moved to dismiss the complaint before answering pursuant, *inter alia*, to New York Civil Practice Law and Rules §3211(a)(1). More specifically, documentary evidence was offered to establish that the defendant held none of the offices specifically enumerated in the statute.

The documentary evidence presented was, in part, the "Official Rules for the Government of the Democratic Party of Kings County." The defendant contended that these official records, on file with the Board of Elections of the City of New York, the Office of the Secretary of State and the New York State Board of Elections, conclusively established that Meade Esposito did not hold the office of "County Leader" of the County of Kings. That is that Mr. Esposito did not hold any position enumerated in Section 8052 of the Unconsolidated Laws.

Justice Alvin F. Klein, Justice of the Supreme Court, New York County, adopted the arguments advanced by the appellant and dismissed the appellee's complaint. (A11) In his decision, Justice Klein concluded that §8052 of the Unconsolidated Laws had to be "strictly construed" and applied. Thus, on the basis of the documentary evidence submitted by the appellant, the court found that Mr. Esposito did not hold the office of County Leader of Kings County and, therefore, was not a person who held a position

specified in §8052 of the Unconsolidated Laws. (A7) Appellee's complaint was accordingly dismissed pursuant to CPLR §3211(a)(1).

Exclusive of the pleadings and the documentary evidence offered in support thereof, there were no other proceedings at which any proof was received, nor were any additional findings of fact made by the court at *nisi prius*.

On appeal in the Supreme Court of the State of New York, Appellate Division, First Department, the appellee argued that the appellant's status in his party should be determined by analyzing the functions he performs, rather than by his title. The Appellate Division, in reversing Special Term, approved "this method of statutory construction by functional analysis" (A3) and held that under this view the documents submitted were not dispositive of the issue of whether the appellant was a county leader.

The appellant, in his motion for reargument and/or permission to appeal to the Court of Appeals, pointed out that application of this so-called "functional analysis" would raise serious vagueness problems violative of the United States Constitution.

The Appellate Division granted the appellant's motion to appeal to the Court of Appeals of the State of New York. On October 15, 1981, the Court of Appeals affirmed the decision of the Appellate Division without opinion. (A1)

Accordingly, the instant appeal focuses principally upon the issue of whether the New York courts are correct in determining that this statute should be broadly applied via a functional analysis approach or whether the appellant's claim that statutes of this nature require strict application—lest they run afoul of the constitutional proscriptions against vagueness—should prevail.

ARGUMENT

The Application of Section 8052 of the Unconsolidated Laws by Functional Analysis Violates Due Process.

The due process clause of the Fourteenth Amendment to the United States Constitution requires that an enactment be struck as void if its prohibitions are so vague as to fail to apprise a citizen of ordinary intelligence who shall be subject to the statute and what conduct is proscribed. This Court articulated the reasons for this rule in *Grayned* v. *City of Rockford,* 408 U.S. 104, 109-110, 92 S.Ct. 2294, 2298-99 (1972):

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked." (Footnotes omitted.)[2]

[2] While *Grayned* involved construction of a criminal statute, the vagueness problem has equal applicability in civil law (especially

It is submitted that the determination of the courts in New York that "functional analysis" can be applied to determine who is a "county leader", as that term is used in Section 8052 of the Unconsolidated Laws, would controvert each of the values protected by the due process prohibition against vagueness. See generally, *Cramp* v. *Board of Public Instruction of Orange County, Fla.*, 368 U.S. 278, 287, 82 S.Ct. 275, 280-281 (1961).

While it is true that the vagueness challenge is typically raised in the context of the language of a statute, in the instant case the statute is admirably narrow and precise. Thus, in the present instance, the objection raised is to the *application* imposed by the Appellate Division's decision and not to the statute's language. As this Court acknowledged in *Bouie* v. *City of Columbia*, 378 U.S. 347, 352-353, 84 S.Ct. 1697, 1701-1702 (1964):

> [There is] a potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical "void for vagueness" situation. When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of secu-

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where a statute incorporates severe penalties, such as forfeiture). It applies to any law, civil or criminal, which requires or prohibits certain behavior. *Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 45 S.Ct. 295 (1925). It is not a criminal penalty that is invalid in such situations, "but the exaction of obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all." *Small Co., supra*, 267 U.S. at 239.

> rity, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required "to speculate as to the meaning of penal statutes," . . . or to "guess at [the statute's] meaning and differ as to its application." . . . the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.
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> • • •
>
> Indeed, an unforeseeable judicial enlargement of a . . . statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, §10, of the Constitution forbids.

It is respectfully submitted that, as will be discussed in more detail, *infra,* the application the New York courts wish to impose on Section 8052 of the Unconsolidated Laws will create grave vagueness problems in violation of due process of law.

a. Section 8052 of the Unconsolidated Laws as Construed by the New York Courts Fails to Give Adequate Notice of Its Application

Turning to the first objection to vague laws—i.e., "that a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application"—it is respectfully suggested that the Appellate Division's finding that an unspecified and unregulated "functional analysis" should be superimposed upon the language of §8052 violates due process principles. *Baggett* v. *Bullitt,* 377 U.S.

360, 367, 84 S.Ct. 1316, 1320 (1964); *Lanzetta* v. *State of New Jersey*, 306 U.S. 451, 59 S.Ct. 618 (1939).

Under the construction of the statute by way of a "functional analysis", how could any individual know whether he was acting as a "county leader" within the meaning of the statute? What party posts would be subject to the proscriptions of this law? Even if an individual held but a minor party post, or no party position at all, could one nonetheless be found, through "functional analysis", to be the equivalent of a "county leader"; and how much involvement would be too much?

Not only would persons of ordinary intelligence have difficulty trying to answer these questions, but so would members of the bar. Suppose an attorney was consulted by his client and told: "I am not the County Leader of this county, although I do perform certain activities which could be construed to be similar to those performed by a 'County Leader'. I have been offered a position as Vice President of a local race track licensed to conduct parimutuel racing events. Can I accept the position or not?"

The attorney would frankly be unable to counsel his client effectively. Of course he could explain the concept of "functional anlysis"—but when his client asked "what are the standards; what conduct is too much; what conduct can be safely pursued so that the statute will not be triggered"—the attorney would once again be without an effective answer. It is respectfully asserted that if the application of a statute is so undefined that a member of the bar can not effectively counsel his client as to the state of the law, such an application must, self-evidently, run afoul of the due process proscription against vagueness.

The Appellate Division directed in its opinion that a "functional analysis" be applied to Section 8052, but this

direction fails to answer any of the self-evident problems that would arise in the course of such an analysis. For example, who should undertake such an analysis: the court, counsel, the plaintiff? How will the decision be made: as a matter of law, as a matter of fact or both? Who should make this decision—the judge or the jury? When will this decision be made: during the pretrial proceedings, at a hearing, or during a trial on the merits? What will the burden of proof be? Who will carry the burden of going forward or of persuasion on the issue? Is it an essential element of the plaintiff's case or an affirmative defense to be proposed by the defendant? The questions are endless.

Clearly, the Appellate Division's "functional analysis" approach provides no notice, nor ascertainable standards by which the bar may be informed (much less the citizenry) of what actions will give rise to a finding that someone has acted as a "county leader". Accordingly, it is respectfully asserted that the Appellate Division's interpretation of Section 8052 renders the statute unconstitutional in that it provides no notice.

b. The Statute as Construed Fails to Provide Any Ascertainable Standards by Which a Judge or Jury Could Determine the Controversy

Applying the concept of "functional analysis" to Section 8052 also triggers the constitutional dilemma created when the application of a statute results in the loss of ascertainable standards for determining the merits of the controversy. As this Court stated in its decision in *Giaccio* v. *State of Pennsylvania*, 382 U.S. 399, 402-3, 86 S.Ct. 518, 520-521 (1966):

> It is established that a law fails to meet the requirements of the due process clause if it is so vague and

> standardless that it leaves the public uncertain as to the conduct it prohibits or *leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.* (Emphasis supplied.)

See, *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839 (1972); *Goguen* v. *Smith*, 471 F.2d 88, 95-96 (1st Cir. 1972).

In the instant case, the determination of who is a "county leader" within the meaning of Section 8052 is left to the whims and vagaries of individual decision making. It is no answer that appellate review will rectify all errors, for, not only are there similarly no standards by which appellate judges can make this determination, but once a political party post is forfeited, who can guarantee that it will be regained? Further, who can compensate the defendant for his time, for the cost of litigation and for the damage to his reputation?

Since no standards or definitions are provided by Section 8052 (or by any other statute, law, act, rule regulation, guideline, or even by the appellate court's decision) to assist one in determining who is a county leader, it must be assumed that the New York Legislature meant the statute to apply only to persons holding the offices specifically enumerated therein. If in fact the Legislature intended that the term "county leader" be interpreted functionally, then the statute must be redrafted to reflect their intent. This is particularly true since the traditional interpretation of *malum prohibitum* statutes, which involve forfeitures, is strict rather than expanded construction and/or application.

It is respectfully contended that it is not the judiciary's role to impose a "functional analysis" in the absence of

any defined standards as to what will form the basis for such analysis. Self-evidently, the law as presently interpreted provides neither notice of the prohibited conduct, nor standards to be applied by judge or jury. Section 8052, as it has been interpreted by the Appellate Division, violates due process of law for both of these reasons.

c. The Statute as Construed Could "Chill" the Exercise of Constitutionally Protected Political Activities

Another due process difficulty which arises in the context of this case is the fact that the breadth of the application suggested by the Appellate Division creates an impermissible infringement upon constitutionally protected areas. As the Supreme Court stated in *Smith* v. *Goguen*, 415 U.S. 566, 574, 94 S.Ct. 1242, 1247 (1974):

> [T]here is a greater solicitude that courts have, and ought to have, about the fear-inducing effect of any law which, by its very scope constitutes a broad-gauged potential sanction against many who would seek to express themselves. So many cases have concerned themselves with this kind of anticipatory and open-ended threat of retaliation that a . . . jargon has crept into our jurisprudence . . . [a] "chilling effect" . . .
>
> We have viewed the Massachusetts statute under which appellee was punished and have determined that it cuts a swath far beyond the individual defendant whose conduct is sought to be penalized. It is a double-edged sword of Damocles not only menacing the exercise of constitutional freedoms, but also serving to obstruct any future adjudications with regard to unknown, innumerable other individuals who may, because of the breadth of the statute, forego asserting their rights under fear of criminal prosecution and punishment.

Accord, *Goguen* v. *Smith*, 471 F.2d 88, 96-97 (1st Cir. 1972). Cf. *In Re Primus*, 436 U.S. 412, 98 S.Ct. 1893 (1978); *Greene* v. *Sinclair*, 491 F.Supp. 19 (W.D. Mich. 1980).

The underlying vagueness of the interpretation imposed by the Appellate Division may very well cause citizens to avoid performing activities which are, in fact, constitutionally protected. Such overbreadth in a statute is uniformly condemned as a violation of due process. See *Colautti* v. *Franklin*, 439 U.S. 379, 99 S.Ct. 675 (1979); *Keyishan* v. *Board of Regents*, 385 U.S. 589, 87 S.Ct. 675 (1967). Indeed, a greater degree of precision is required when the statute impinges on activities protected by the First Amendment. *Hynes* v. *Mayor and Council of Borough of Oradell*, 425 U.S. 610, 96 S.Ct. 1755 (1976); *Winters* v. *New York*, 333 U.S. 507, 68 S.Ct. 665 (1948).

Absent compelling state interests to the contrary, an individual's political activities enjoy full First Amendment protection. See, *Gibson* v. *Florida Legislative Investigation Commission*, 372 U.S. 539, 83 S.Ct. 889 (1963); *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 83 S.Ct. 328 (1963). Now, however, confronted with the explicit construction accorded Section 8052, individuals may choose to forego otherwise lawful political activities, for fear that their participation may later subject them to expensive time-consuming litigation that could damage their reputations. Self-censorship of this nature unduly infringes upon important First Amendment rights and results in an impermissible chill of lawful political activities. See, *Dombrowski* v. *Pfister*, 380 U.S. 479, 468, 85 S.Ct. 1116, 1120 (1965).

Thus, because individuals confronted with the present interpretation of Section 8052 will likely be chilled from asserting their rights, it is submitted that applying this statute through a "functional analysis" violates not only

the Fourteenth, but the First Amendment to the United States Constitution as well.

In summary, as the District of Columbia Circuit Court of Appeals stated in *Ricks* v. *District of Columbia*, 414 F.2d 1097, 1100-1101 (D.C. Cir. 1968):

> Reasonable precision in . . . definition . . . has been regarded as a desideratum by free people since the early days of the common law. That precept, virtually from the birth of the Nation, has occupied a position of honor in the scheme of constitutional values, and for justifications of the highest order [sic]. Fluid language which sweeps citizens under the penumbra of . . . legislation without warning is abhorrent. The imposition of . . . liability for behavior which a person could not reasonabbly understand to be prohibited offends the most rudimentary considerations of fairness. "No one may be required at peril of life, liberty or property to speculate as to the meaning of . . . statutes. All are entitled to be informed as to what the State commands or forbids." Thus "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process."
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> Since most people shy away from legal violations, personal liberty is unconstitutionally dampened when one can but doubt whether he is actually free to pursue particular conduct. Moreover, definitional uncertainty is an open invitation, if indeed not inevitably an antecedent, to virtually unrestrained administration.
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> • • •

So it is that a . . . statute perishes on constitutional grounds when it leaves speculative the tests for ascertaining the line separating guilty from innocent acts. (Footnotes omitted.)

CONCLUSION

If the decisions of the New York courts are not overruled by this Court, not only will it become impossible in advance to determine who is a "county leader" within the meaning of Section 8052 of the Unconsolidated Laws, but it will become impossible to determine to whom *any* of the enumerated positions might be applied.

Indeed, the New York courts have, in effect, granted their permission to the use of "functional analysis" in a wide variety of circumstances. Any statute which prohibits enumerated persons from acting in a particular manner could be applied via such analysis.

Wherefore, it is respectfully submitted that this Court should exercise jurisdiction in this matter and reverse the determination of the courts below.

Dated: January 13, 1982

Respectfully submitted,

James M. LaRossa
Counsel for Defendant-Appellant
Meade H. Esposito
LaRossa, Brownstein & Mitchell
522 Fifth Avenue
New York, New York 10036
(212) 687-4100

APPENDIX

Order of Court of Appeals

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, *Presiding*

No. 397

Robert Abrams,
Attorney General of the State of New York,
Respondent,

v.

Meade H. Esposito,
Appellant.

The appellant in the above entitled appeal appeared by La Rossa, Brownstein & Mitchell, Esqs.; the respondent appeared by Hon. Robert Abrams, Attorney General of the State of New York.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs, for reasons stated in the memorandum at the Appellate Division (75 AD2d 528). Question certified answered in the affirmative. All concur. Meyer, J., taking no part.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ Joseph W. Bellacosa
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, October 15, 1981.

Memorandum Decision of Appellate Division

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

ROBERT ABRAMS,
Attorney General of the State of New York,

Plaintiff-Appellant,

—against—

MEADE H. ESPOSITO,

Defendant-Respondent.

SULLIVAN, *J.P.*, SILVERMAN, LYNCH, CARRO, *JJ.*

Order, Supreme Court, New York County (Klein, J.), entered October 5, 1979, dismissing the amended complaint pursuant to CPLR 3211 (a) 1, a defense based on documentary evidence, in this action arising under Pari-Mutuel Revenue Law (Title 21, Chapter 2, Unconsolidated Laws) as to political party officers having any dealings with horse race tracks, and a subsequent judgment entered on said order on October 9, 1979, unanimously reversed, on the facts and the law, and the motion to dismiss the amended complaint denied, without costs or disbursements.

Section 8052, Unconsolidated Laws forbids an interest in a pari-mutuel licensee to a political party officer who is defined, in part, as a "county leader, chairman, vice-chairman, counsel, secretary or treasurer of a county committee". As authorized by the section, the Attorney General has commenced this action to remove the defendant from party office, alleging that he has an interest in a pari-

mutuel licensee that is forbidden to him because he is the county leader of the Kings County Democratic party. Special Term dismissed the amended complaint. It found that the document offered in defense, the Rules of the Democratic Party of Kings County, makes no provision for a county leader, and that the defendant is Chairman of the Executive Committee of the Kings County Democratic Committee. It held that, under the strict construction necessary because the statute is one of forfeiture, the defendant holds no position within the statute's definition of a party officer.

Section 8052 was intended to eliminate "the opportunity of political influence for private gain" (Message of the Governor, Legislative Document [1954] No. 79) and to "effect a complete divorcement between all public officials and all proprietors of race tracks" (*Maguire* v. *Monaghan*, 206 Misc 550, 556; see also *Matter of Murtha* v. *Monaghan*, 1AD2d 178, 188). Under the construction urged by the defendant, party officers could readily defeat the intention of the legislature by the simple device of giving to their positions titles different from those set forth in the statutory definition. The rules of strict construction do not command such inflexibility; they do not constrain a court to defeat the evident intention of the lawmaker (*People ex rel. S.J. Groves & Sons* v. *Hamilton*, 227 App. Div. 356, 358, affd. 254 N.Y. 54). Rather, statutes of forfeiture must "receive a reasonable construction, and the courts will search for and follow the true intent of the legislature . . ." (44 NY Jur, Penalties and Forfeitures, §8).

Whether a party officer is subject to the prohibition of section 8052 depends on the functions he performs, the duties of the position, and not the title given to it. This method of statutory construction by functional analysis

has been endorsed by the courts in actions involving the removal of civil servants from office and, by analogy, it is appropriate here. (See *Matter of Driscoll* v. *Troy Housing Authority,* 6 NY 2d 513; *Matter of Mercer* v. *Dowd,* 288 N.Y. 381; *Matter of Rohr* v. *Kenngott,* 288 N. Y. 97). Under this construction, the document offered in defense is not dispositive of the issue whether the defendant is the county leader.

The defendant asserts that the plaintiff is precluded from bringing this appeal by his failure to have appealed the order that dismissed the original complaint and which applied a strict construction of the statute. We do not agree. The prior order did not involve the documentary defense. It held that the original complaint did not state a cause of action because it failed to allege that the defendant's conduct was knowing and wilful and it gave leave to replead.

Order filed.

Order of Appellate Division

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 15, 1980.

Present:

HON. JOSEPH P. SULLIVAN,
Justice Presiding,

SAMUEL J. SILVERMAN, J. ROBERT LYNCH, JOHN J. CARRO,
Justices.

7746-47

ROBERT ABRAMS,
Attorney General of the State of New York,

Plaintiff-Appellant,

—against—

MEADE H. ESPOSITO,

Defendant-Respondent.

An appeal having been taken to this Court by the plaintiff-appellant from the order of the Supreme Court, New York County (Klein, J.), entered on October 5, 1979, dismissing the amended complaint, pursuant to CPLR 3211 (a)1, and from the judgment entered thereon on October 9, 1979, and said appeal having been argued by Mr. Elliot S. Greenspan, of counsel for the appellant, and by Mr. James La Rossa, of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

Order of Appellate Division

It is unanimously ordered that the order and judgment so appealed from be and the same are hereby reversed, on the facts and on the law, without costs and without disbursements, and the motion to dismiss the amended complaint denied.

ENTER:

FRANCIS X. GALDI
Deputy Clerk

Clerk.

FILED
APR 18 1980
New York
Co. Clerk's Office

Decision of the Supreme Court of the State of New York

SUPREME COURT—NEW YORK COUNTY

SPECIAL TERM—PART I

Ind. No. 42715/78—#133—May 14, 1979

ROBERT ABRAMS,
Attorney General of the State of New York,

Plaintiff,

—against—

MEADE H. ESPOSITO,

Defendant.

KLEIN, *J.:*

This is a motion for an order (CPLR 3211) dismissing the amended complaint.

Plaintiff brought this action, pursuant to Section 8052 of the Unconsolidated Laws of the State of New York, to have defendant removed from the party office of "County Leader of the Democratic Party for the County of Kings" for having allegedly had business dealings with licensees of the New York State Racing and Wagering Board in violation of said statute.

By order, dated February 7, 1979, Mr. Justice Bentley Kassal dismissed the complaint because it did not allege that defendant's violation of the statute was knowing and wilful. Upon leave granted by Justice Kassal, plaintiff served an amended complaint containing the necessary allegations as to knowledge and wilfulness.

Defendant now seeks dismissal of the amended complaint, alleging that he does not hold a party office as

defined by said statute. As is relevant here, Section 8052, subd. 3(c)(3), defines "party office" as: "A county leader, chairman, vice-chairman, counsel, secretary or treasurer of a county committee."

The amended complaint alleges that the defendant is the "County Leader of the Democratic Party of Kings County." Defendant avers that he is the "Chairman of the Executive Committee of the Kings County Democratic Committee" and not the County Leader.

Defendant as part of his documentary evidence, has submitted with his moving papers the Rules of the Democratic Party of Kings County (Defendant's exhibits I, J and K). Article V of said rules established the position of *Chairman of the Executive Committee of the Kings County Democratic Committee.* It is apparent to the Court that, since January, 1969, Meade H. Esposito has held the position of Chairman of the Executive Committee of the Kings County Democratic Committee in accordance with the aforesaid rules. He is not the "county leader" of the Democratic Party of Kings County since no such position exists under said rules. These rules are official documents on file with the State Board of Elections and the Board of Elections of Kings County (Election Law § 2-114, subd. 1).

The party position held by defendant does not fall within Section 8052, subd. 3(c)(3). In fact, defendant holds no party position of any kind which would come under Section 8052.

The removal provision of the statute provided for by the legislature in subd. 2 of Section 8052 is punitive in nature and involves a forfeiture of public office.

In New York State Thruway Authority v. Maislin Bros., 35 AD2d 301, 303, the Court said:

> "It is familiar law that a statute imposing a penalty or forfeiture shall be strictly construed and is not to

> be extended by implication or construed to cover cases not clearly within its terms (44 N.Y. Jur., Penalties and Forfeitures, § 3)."

Black in the second edition of his authoritative work, entitled "Interpretation of Laws," in section 137, states:

> "Finally, the rule of strict construction of these statutes means that, as between the state, prosecuting or seeking to enforce a penalty or forfeiture, and the party sought to be charged, the construction must be strict against the state and favorable to the innocence, liberty, or rights of the defendant."

If the Legislature intended to include as a party officer a person holding the position held by the defendant, it would clearly have said so by appropriate and explicit language.

In 1954, twenty-five years ago, Colonel John Hay Whitney asked the Honorable Nathaniel L. Goldstein, the then Attorney General of the State of New York, for an opinion as to whether or not the various political offices which he held constituted a violation of Section 63 of the Pari-Mutuel Revenue Law (this section is identical to § 8052 with respect to the definition of "party officer").

In his opinion, the Attorney General said:

> "Colonel Whitney is a member of the New York State Banking Board, which is a part time position for which he receives no compensation. He is also a member of the Republican State Finance Committee of the State of New York, the Republican National Finance Committee, and is Chairman of the United Republican Finance Committee for the State of New York. He is not an officer or member, or member of

> an executive committee, of any other national committee or New York State committee or of any New York State county committee."

In determining that Colonel Whitney had not violated that statute, the Attorney General stated:

> "It is entirely apparent from these quotations from the statute that Colonel Whitney is neither a public officer nor a party officer as such positions are defined in the statute. He is not a public officer within the definition of that term contained in the cited section, as that definition excludes public officers who receive no compensation. *He is not a party officer within the definition of that term contained in the section, as he holds none of the party offices listed therein.*"

Upon a careful reading of all the papers submitted herein, the Court finds that the defendant has presented a factual showing upon documentary evidence that, as a matter of law, no triable issue of fact exists to require a plenary trial (Sillman v. Twentieth Century-Fox Corporation, 3 NY2d 395; Firedoor Corp. of America v. Reliance Electric Co., 56 AD2d 523; Gray Manufacturing Co. v. Pathe Industries, Inc., 33 AD2d 739, affd 26 NY2d 1045; Kramer v. Harris, 9 AD2d 282; P.D.J. Corp. v. Bansh Properties, Inc., 23 NY2d 971).

The motion is granted pursuant to CPLR 3211 (a)(1).

Settle order.

Dated: July 16 1979.

/s/ A. F. K.
J. S. C.

Order of Supreme Court of the State of New York

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse at 60 Centre Street, New York, New York on the 2nd day of October, 1979.

Present:

HON. ALVIN F. KLEIN,

Justice.

Index No. 42715/78

ROBERT ABRAMS,
Attorney General of the State of New York,

Plaintiff,

—against—

MEADE H. ESPOSITO,

Defendant.

Defendant having moved by notice of motion dated May 3, 1979, for an order dismissing the complaint pursuant to CPLR §§3211(a)(1), 3211(a)(5), 3211(a)(7) and 3211(c).

Now upon reading and filing the notice of motion, the affidavit of James M. La Rossa, sworn to May 4, 1979 and the Exhibits annexed thereto, and the affidavit of Elliot S. Greenspan in opposition, sworn to May 29, 1979 and the Exhibits annexed thereto, and this matter having come on to be heard on May 14, 1979, and having been submitted

Order of Supreme Court of the State of New York

before this Court, and a decision having been rendered on July 16, 1979, it is

ORDERED, that the motion to dismiss pursuant to CPLR §3211(a)(1) is granted, and it is further

ORDERED, that the complaint is dismissed because the Court finds that the defendant has presented a factual showing upon documentary evidence that, as a matter of law, no triable issue of fact exists to require a plenary trial and the Clerk of the Court is hereby directed to enter judgment accordingly.

ENTER

/s/ A. F. K.
J. S. C.

FILED
OCT. 5, 1979
New York
Co. Clerk's Office

Judgment Entered on Order of Supreme Court of the State of New York

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 42715/78

ROBERT ABRAMS,
Attorney General of the State of New York,

Plaintiff,

—against—

MEADE H. ESPOSITO,

Defendant.

A motion having been made by the defendant for a judgment of dismissal pursuant to CPLR 3211(a), subdivisions (1), (5), (7) and CPLR 3211(c) and the motion having regularly come on to be heard at a Special Term, Part I of this Court on the 14th day of May, 1979, and the motion having been granted pursuant to CPLR 3211 (a)(1) and order directing that the complaint in the above entitled action be dismissed, for the reason stated therein, having been entered and filed in the office of the Clerk of the County of New York, on the 5th day of October, 1979.

Now on motion of James M. La Rossa, attorney for the defendant, it

ADJUDGED that the complaint in the above entitled action be and the same is hereby dismissed.

Judgment Entered on Order of Supreme Court of the State of New York

Judgment signed and entered this 9th day of October, 1979.

/s/ NORMAN KOCH
Clerk

FILED
OCT. 9, 1979
County Clerk's Office
New York

Notice of Appeal to the Supreme Court of the United States

COURT OF APPEALS

STATE OF NEW YORK

Index No. 42715/78

ROBERT ABRAMS,
Attorney General of the State of New York,
Plaintiff/Appellee,

—against—

MEADE H. ESPOSITO,
Defendant/Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Meade H. Esposito, the defendant/appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York, entered on October 15, 1981, affirming the Appellate Division's reversal of the trial court's dismissal of the complaint.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

LAROSSA, BROWNSTEIN & MITCHELL
Attorneys for Defendant/Appellant
MEADE H. ESPOSITO
Office and P.O. Address
522 Fifth Avenue
New York, New York 10036
(212) 687-4100

RECEIVED
Nov. 19, 1981
COURT OF APPEALS

Notice of Appeal to the Supreme Court of the United States

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JANET ROMANO, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides at 1074 65th Street, Brooklyn, New York 11219.

That on the 16 day of November, 1981, deponent served the within NOTICE OF APPEAL upon the following:

HON. ROBERT ABRAMS
Attorney General
Attorney for Plaintiff/Appellee
The Capitol
Albany, New York 12224

the address designated by said attorney(s) for that purpose by depositing a true copy thereof enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

/s/ JANET ROMANO
Janet Romano

Sworn to before me this
16th day of November, 1981.

/s/ SHIRLEY FOLK
Notary Public
Shirley Folk
Notary Public, State of New York
No. 01-4709089, Qual. in Kings Co.
Term Expires March 30, 1982

Order of Appellate Division of the Supreme Court of the State of New York

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, June 10, 1980.

Present:

HON. JOSEPH P. SULLIVAN,
Justice Presiding,

SAMUEL J. SILVERMAN, J. ROBERT LYNCH, JOHN CARRO,
Justices.

M-2052

ROBERT ABRAMS,
Attorney General of the State of New York,
Plaintiff-Appellant,

—against—

MEADE H. ESPOSITO,
Defendant-Respondent.

The above-named respondent having moved for leave to reargue the order of this Court entered on April 15, 1980, or, in the alternative, for leave to appeal to the Court of Appeals,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

Order of Appellate Division of the Supreme Court of the State of New York

It is hereby ordered that said motion, insofar as it seeks reargument, be and the same hereby is denied. Insofar as the motion seeks leave to appeal to the Court of Appeals, the motion is granted and this Court, pursuant to CPLR 5713, certifies that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:

"Was the order of this Court, which reversed the order of the Supreme Court, properly made?"

This Court further certifies that its determination was made as a matter of law and not in the exercise of discretion.

ENTER:

JOSEPH J. LUCCHI
Clerk.

Summons

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 42715/78

The basis of venue is that plaintiff maintains a principal office in New York County at Two World Trade Center, New York, New York

---

ROBERT ABRAMS,
Attorney General of the State of New York,

Plaintiff,

—against—

MEADE H. ESPOSITO,

Defendant.

To the Above Named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer upon plaintiff's attorney within 20 days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Summons

Dated: New York, New York
April 4, 1979

Robert Abrams
Attorney General of the
State of New York
Attorney for Plaintiff
Office & P.O. Address
Two World Trade Center
New York, N.Y. 10047
Tel. No. (212) 488-3297

Amended Complaint

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 42715/78

ROBERT ABRAMS,
Attorney General of the State of New York,

Plaintiff,

—against—

MEADE H. ESPOSITO,

Defendant.

ROBERT ABRAMS, Attorney General of the State of New York, complains of the defendant pursuant to § 8052, subd. 2 of the Unconsolidated Laws of the State of New York, by this amended complaint and alleges:

FOR A FIRST CAUSE OF ACTION

First: That upon information and belief from at least 1969 to the present, the defendant has been a party officer, namely, County Leader of the Democratic Party in the County of Kings, State of New York, within the definition of § 8052, subd. 3(c)(3) of the Unconsolidated Laws of the State of New York.

Second: That upon information and belief from on or about March 23, 1973 until on or about April 1, 1977, the defendant has been a party officer, namely, a member of the Democratic National Committee, within the definition

of § 8052, subd. 3(c)(1) of the Unconsolidated Laws of the State of New York.

Third: That § 8052, subd. 1(d) of the Unconsolidated Laws of the State of New York prohibits any party officer from selling, or being a member of a firm, or owning ten per centum or more of the stock of any corporation which sells any goods or services to any firm, association, or corporation which is licensed by the State of New York to conduct pari-mutuel racing within the meaning of § 8052, subd. 1(b) of the Unconsolidated Laws of the State of New York.

Fourth: That upon information and belief from in or about June 1976 to date, defendant has been the vice-president and the holder of more than ten per centum of the shares of stock of Serres, Visone & Rice, Inc., a domestic corporation.

Fifth: That upon information and belief, Serres, Visone & Rice, Inc. is an insurance brokerage firm licensed by the State of New York with offices at 170 Broadway, New York, New York.

Sixth: That from in or about August 1975, up to and including October 1977, Parr Meadows Racing Association, Inc., a domestic corporation, was licensed by the New York State Racing and Wagering Board as the builder, owner and operator of a quarter horse racetrack at which pari-mutuel racing activities would be conducted.

Seventh: That upon information and belief the defendant, in or about and between August 1976 and June 1977, as a party officer within the definition of § 8052, subd.

3(c)(3) of the Unconsolidated Laws of the State of New York, and as owner of more than ten per centum of the stock of Serres, Visone & Rice, Inc., knowingly and wilfully sold and participated in the sale of services to a licensee of the New York State Racing and Wagering Board in violation of § 8052 of the Unconsolidated Laws of the State of New York.

Eighth: That upon information and belief the defendant, in or about and between August 1976 and April 1977, as a party officer within the definition of § 8052, subd. 3(c)(1) of the Unconsolidated Laws of the State of New York, and as owner of more than ten per centum of the stock of Serres, Visone & Rice, Inc., knowingly and wilfully sold and participated in the sale of services to a licensee of the New York State Racing and Wagering Board in violation of § 8052 of the Unconsolidated Laws of the State of New York.

Ninth: That upon information and belief in or about August 1976, the defendant, a party officer, knowingly and wilfully caused Serres, Visone & Rice, Inc., to obtain a $10,800,000.00 builder's risk insurance policy for a licensee of the New York State Racing and Wagering Board, to wit, the Parr Meadows Racing Association, Inc., builder, owner and operator of a quarter horse racetrack situated in Yaphank, New York.

Tenth: That upon information and belief in or about August 1976, Serres, Visone & Rice, Inc., received a commission in the amount of $3,240.00 for obtaining the $10,800,000.00 builder's risk insurance policy referred to in par. *"Ninth"* above, for Parr Meadows Racing Association, Inc.

Eleventh: That upon information and belief in or about and between May 1977 and June 1977, defendant, a party officer, knowingly and wilfully caused Serres, Visone & Rice, Inc., through Joseph Martuscello, vice-president of Serres, Visone & Rice, Inc., to obtain a $12,520,000.00 all risk insurance policy for a licensee of the New York State Racing and Wagering Board, to wit, the Parr Meadows Racing Association, Inc., builder, owner and operator of a quarter horse racetrack situated in Yaphank, New York.

Twelfth: That upon information and belief in or about July 1977, Serres, Visone & Rice, Inc., received a commission in the amount of $9,717.00 for obtaining the $12,520,000.00 all risk insurance policy referred to in par. *"Eleventh"* above for the Parr Meadows Racing Association, Inc.

Thirteenth: That by reason of all of the facts set forth in the foregoing paragraphs defendant MEADE H. ESPOSITO, a party officer within the definition of § 8052, subd. 3(c)(3) of the Unconsolidated Laws of the State of New York, is in violation of § 8052 of the Unconsolidated Laws of this State which prohibit defendant's interest in and participation in the sale of services to licensees of the New York State Racing and Wagering Board involved in pari-mutuel racing activities.

Fourteenth: That by reason of all of the facts set forth in the foregoing paragraphs defendant MEADE H. ESPOSITO a party officer within the definition of § 8952, subd. 3(c)(1) of the Unconsolidated Laws of the State of New York was in violation of § 8052 of the Unconsolidated Laws of this State which prohibit defendant's interest in and participation in the sale of services to licensees of the New York

State Racing and Wagering Board involved in pari-mutuel racing activities.

Fifteenth: That by reason of defendant's knowing and wilful violations of § 8052 of the Unconsolidated Laws of the State of New York, he has become disqualified and is disqualified from holding the party office of and functioning as the County Leader of the Democratic Party of Kings County and as a result thereof, said office has become and is subject to forfeiture.

FOR A SECOND CAUSE OF ACTION

Sixteenth: The plaintiff repeats and realleges each and every allegation in the paragraphs contained in the First Cause of Action marked and numbered *"First"*, *"Second"*, *"Fourth"*, *"Fifth"*, *"Sixth"*, *"Seventh"*, *"Eighth"*, *"Ninth"*, *"Tenth"*, *"Eleventh" and "Twelfth"*, with the same force and effect as if hereafter set forth at length.

Seventeenth: That § 8052, subd. 1(d) of the Unconsolidated Laws of the State of New York prohibits any party officer from selling, or being a member of a firm, or owning ten per centum or more of the stock of any corporation which sells any goods or services to any firm, association or corporation which is licensed by the State of New York to conduct business at or in connection with, a racetrack at which pari-mutuel race meets are conducted within the meaning of § 8052, subd. 1(b) of the Unconsolidated Laws of this State.

Eighteenth: That by reason of all of the facts set forth in the foregoing paragraphs defendant MEADE H. ESPOSITO, a party officer within the definition of § 8052, subd. 3(c)(3)

of the Unconsolidated Laws of the State of New York, is in violation of § 8052 of the Unconsolidated Laws of this State which prohibit defendant's interest in and participation in the sale of services to licensees of the New York State Racing and Wagering Board involved in pari-mutuel racing activities.

Nineteenth: That by reason of all the facts set forth in the foregoing paragraphs the defendant MEADE H. ESPOSITO, a party officer within the definition of § 8052 subd. 3(c)(1) of the Unconsolidated Laws of the State of New York was in violation of § 8052 of the Unconsolidated Laws of this State which prohibit defendant's interest in and participation in the sale of services to licensees of the New York State Racing and Wagering Board involved in pari-mutuel racing activities.

Twentieth: That by reason of defendant's knowing and wilful violations of § 8052 of the Unconsolidated Laws of the State of New York, he has become disqualified and is disqualified from holding the party office of and functioning as the County Leader of the Democratic Party of Kings County and as a result thereof, said office has become and is subject to forfeiture.

FOR A THIRD CAUSE OF ACTION

Twenty-First: The plaintiff repeats and realleges each and every allegation of the paragraphs contained in the First Cause of Action marked and numbered *"First"* and *"Second"* with the same force and effect as if hereafter set forth at length.

Twenty-Second: That § 8052, subd. 1(d) of the Unconsolidated Laws of the State of New York prohibits any

party officer from selling, or being a member of a firm, or owning ten per centum or more of the stock of any corporation which sells any goods or services to any firm, association, or corporation which owns or leases to any association or corporation licensed by the New York State Quarter Horse Racing Commission or its successor, the New York State Racing and Wagering Board, a racetrack at which pari-mutuel racing is conducted within the meaning of § 8052, subd. 1(b) of the Unconsolidated Laws of the State of New York.

Twenty-Third: That upon information and belief in or about the year 1975 defendant was the vice-president and the holder of more than ten per centum of the shares of stock of Grand Brokerage, Inc., a domestic corporation.

Twenty-Fourth: Grand Brokerage, Inc. was an insurance brokerage firm licensed by the State of New York with offices at 170 Broadway, New York, New York.

Twenty-Fifth: That from in or about October 1972, up to and including June, 1975, Suffolk Meadows Quarter Horse Racing Association, Inc., a domestic corporation, was licensed by the New York State Quarter Horse Racing Commission and its successor, the New York State Racing and Wagering Board, as the builder and operator of a quarter horse racetrack at which pari-mutuel racing activities would be conducted.

Twenty-Sixth: That upon information and belief the defendant, in or about February 1975, as a party officer within the definition of § 8052, subd. 3(c)(3), of the Unconsolidated Laws of the State of New York, and as owner of more than ten per centum of the stock of Grand

Brokerage, Inc., knowingly and wilfully sold and participated in the sale of services to the lessor of a licensee of the New York State Quarter Horse Racing Commission and its successor, the New York State Racing and Wagering Board, in violation of § 8052 of the Unconsolidated Laws of the State of New York.

Twenty-Seventh: That upon information and belief the defendant, in or about February 1975, as a party officer within the definition of § 8052, subd. 3(c)(1), of the Unconsolidated Laws of the State of New York, and as owner of more than ten per centum of the stock of Grand Brokerage, Inc., knowingly and wilfully sold and participated in the sale of services to the lessor of a licensee of the New York State Quarter Horse Racing Commission and its successor, the New York State Racing and Wagering Board, in violation of § 8052 of the Unconsolidated Laws of the State of New York.

Twenty-Eighth: That upon information and belief in or about February 1975, the defendant, a party officer, knowingly and wilfully caused Grand Brokerage, Inc. to obtain a $12,000,000.00 builder's risk insurance policy for the Parr Company of Suffolk, Inc., a corporation that leased a quarter horse racetrack situated in Yaphank, New York, to Suffolk Meadows Quarter Horse Racing Association, Inc., a licensee of the New York State Quarter Horse Racing Commission and its successor, the New York State Racing and Wagering Board.

Twenty-Ninth: That upon information and belief in or about July, 1975, Grand Brokerage, Inc., received money in the amount of $5,540.00 for obtaining the $12,000,000.00

builder's risk insurance policy referred to in par. *"Twenty-Eighth"* above for the Parr Company of Suffolk, Inc.

Thirtieth: That by reason of all of the facts set forth in the foregoing paragraphs defendant MEADE H. ESPOSITO, a party officer within the definition of § 8052, subd. 3(c)(3) of the Unconsolidated Laws of the State of New York, is in violation of § 8052 of the Unconsolidated Laws of this State which prohibit defendant's interest in and participation in the sale of services to a lessor of a licensee of the New York State Quarter Horse Racing Commission and its successor, the New York State Racing and Wagering Board involved in pari-mutuel racing activities.

Thirty-First: That by reason of all of the facts set forth in the foregoing paragraphs defendant MEADE H. ESPOSITO, a party officer within the definition of § 8052, subd. 3(c)(1) of the Unconsolidated Laws of the State of New York was in violation of § 8052 of the Unconsolidated Laws of this State which prohibits defendant's interest in and participation in the sale of services to a lessor of a licensee of the New York State Quarter Horse Racing Commission and its successor, the New York State Racing and Wagering Board involved in pari-mutuel racing activities.

Thirty-Second: That by reason of defendant's knowing and wilful violations of § 8052 of the Unconsolidated Laws of the State of New York, he has become disqualified and is disqualified from holding the party office of and functioning as the County Leader of the Democratic Party of Kings County and as a result thereof, said office has become and is subject to forfeiture.

Amended Complaint

FOR A FOURTH CAUSE OF ACTION

Thirty-Third: The plaintiff repeats and realleges each and every allegation of the paragraphs contained in the First Cause of Action marked and numbered *"First"*, *"Second"*, *"Third"* and *"Sixth"*, with the same force and effect as if hereafter set forth at length.

Thirty-Fourth: That upon information and belief the defendant, in or about and between November 1975 and August 1976, was a paid director of Mortgagee Affiliates Corp., a domestic closely held corporation.

Thirty-Fifth: That upon information and belief, in or about and between November 1975 and August 1976, the firm of Mortgagee Affiliates Corp., was engaged in the business of mortgage banking and money lending.

Thirty-Sixth: That upon information and belief the defendant, in or about and between November 1975 and August 1976, as a party officer within the definition of § 8052, subd. 3(c)(3) of the Unconsolidated Laws of the State of New York, and as a paid director of Mortgagee Affiliates Corp., knowingly and wilfully sold and participated in the sale of services to a licensee of the New York State Racing and Wagering Board in violation of § 8052 of the Unconsolidated Laws of the State of New York.

Thirty-Seventh: That upon information and belief the defendant in or about and between November 1975 and August 1976, was a party officer within the definition of § 8052, subd. 3(c)(1) of the Unconsolidated Laws of the State of New York, and as a paid director of Mortgagee Affiliates Corp., knowingly and wilfully sold and partic-

ipated in the sale of services to a licensee of the New York State Racing and Wagering Board in violation of § 8052 of the Unconsolidated Laws of the State of New York.

Third-Eighth: That upon information and belief in or about and between November 1975 and August 1976, the defendant, a party officer, knowingly and wilfully provided the service of and participated in the provision of construction financing for a licensee of the New York State Racing and Wagering Board, to wit, Parr Meadows Racing Association, Inc., the builder, owner and operator of a quarter horse racetrack situated in Yaphank, New York, in that Mortgagee Affiliates Corp., of which he was a paid director, obtained a loan for Parr Meadows Racing Association, Inc., in the amount of $14,000,000.00 for the construction of the Parr Meadows Racetrack.

Thirty-Ninth: That upon information and belief a portion of the $14,000,000.00 construction loan to the Parr Meadows Racing Association, Inc., was loaned to the Parr Meadows Racing Association, Inc., by Mortgagee Affiliates Corp.

Fortieth: That upon information and belief Mortgagee Affiliates Corp., in or about August 1976 received compensation from Parr Meadows Racing Association, Inc., for its participation both as broker and as partial lender in the $14,000,000.00 racetrack construction loan transaction.

Forty-First: That upon information and belief in or about August 1976, Mortgagee Affiliates Corp., received from Parr Meadows Racing Association, Inc. the sums of $560,000.00 as a brokerage fee and $32,815.00 as an origi-

nation fee for services rendered with respect to the aforementioned construction loan transaction.

Forty-Second: That by reason of all the facts set forth in the foregoing paragraphs defendant MEADE H. ESPOSITO, a party officer within the definition of § 8052, subd. 3(c)(3) of the Unconsolidated Laws of the State of New York, is in violation of § 8052 of the Unconsolidated Laws of this State which prohibit defendant's interest in and participation in the sale of services to licensees of the New York State Racing and Wagering Board involved in pari-mutuel racing activities.

Forty-Third: That by reason of all the facts set forth in the foregoing paragraphs defendant MEADE H. ESPOSITO, a party officer within the definition of § 8052, subd. 3(c)(1) of the Unconsolidated Laws of the State of New York was in violation of § 8052 of the Unconsolidated Laws of this State which prohibit defendant's interest in and participation in the sale of services to licensees of the New York State Racing and Wagering Board involved in pari-mutuel racing activities.

Forty-Fourth: That by reason of defendant's knowing and wilful violations of § 8052 of the Unconsolidated Laws of the State of New York, he has become disqualified and is disqualified from holding the party office of and functioning as the County Leader of the Democratic Party of Kings County and as a result thereof, said office has become and is subject to forfeiture.

FOR A FIFTH CAUSE OF ACTION

Forty-Fifth: That plaintiff repeats and realleges each and every allegation of the paragraphs contained in the

First, Second and Fourth Causes of Action marked and numbered *"First"*, *"Second"*, *"Sixth"*, *"Seventeenth"*, *"Thirty-Fourth"*, *"Thirty-Fifth"*, *"Thirty-Sixth"*, *"Thirty-Seventh"*, *"Thirty-Eighth"*, *"Thirty-Ninth"*, *"Fortieth"* and *"Forty-First"* with the same force and effect as if hereafter set forth at length.

Forty-Sixth: That by reason of all the facts set forth in the foregoing paragraphs defendant MEADE H. ESPOSITO, a party officer within the definition of § 8052, subd. 3(c)(3) of the Unconsolidated Laws of the State of New York is in violation of § 8052 of the Unconsolidated Laws of this State which prohibits defendant's interest in and participation in the sale of services to licensees of the New York State Racing and Wagering Board involved in pari-mutuel racing activity.

Forty-Seventh: That by reason of all the facts set forth in the foregoing paragraphs defendant MEADE H. ESPOSITO, a party officer within the definition of § 8052, subd. 3(c)(1) of the Unconsolidated Laws of the State of New York was in violation of § 8052 of the Unconsolidated Laws of this State which prohibits defendant's interest in and participation in the sale of services to licensees of the New York State Racing and Wagering Board involved in pari-mutuel racing activities.

Forty-Eighth: That by reason of the defendant's knowing and wilful violation of § 8052 of the Unconsolidated Laws of the State of New York, he has become disqualified and is disqualified from holding the party office and functioning as the County Leader of the Democratic Party in Kings County and as a result thereof said office has become and is subject to forfeiture.

WHEREFORE, plaintiff respectfully prays for judgment against the defendant declaring that he had forfeited his party office of County Leader of the Democratic Party for the County of Kings, State of New York, and that he is disqualified from holding such party office and is ordered removed from said party office, with costs and disbursements of this action to be awarded and adjudged against the defendant.

Dated: New York, New York
April 4, 1979

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Attorney General of the
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Motion to Dismiss or Affirm

No. 81-1324

Office - Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

October Term, 1981

MEADE H. ESPOSITO,

Defendant-Appellant,

against

ROBERT ABRAMS, Attorney General of the State of New York,

Plaintiff-Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION OF APPELLEE TO DISMISS APPEAL

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No. 81-1324

IN THE

Supreme Court of the United States

October Term, 1981

MEADE H. ESPOSITO,

Defendant-Appellant,

against

ROBERT ABRAMS, Attorney General of the State of New York,

Plaintiff-Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION OF APPELLEE TO DISMISS APPEAL

Robert Abrams, Attorney General of the State of New York, plaintiff-appellee in the case to be appealed, moves, pursuant to Rule 16(b) of the Rules of the Supreme Court of the United States, to dismiss the appeal on the following grounds:

1. The judgments below rest on an adequate non-federal ground.

2. The appeal does not present a substantial Federal question.

Opinion Below

The Court of Appeals of the State of New York affirmed the order "for reasons stated in the memorandum at the Appellate Division (75 AD 2d 528),"——NY 2d—— (1981). (A1)*

Statement

This is an appeal, pursuant to 28 USC § 1257(2), from an order of the Court of Appeals of the State of New York filed October 15, 1981. (A1) That court affirmed the Appellate Division of the State Supreme Court and ordered the case remitted to the trial court, the Supreme Court, New York County. The Appellate Division (First Department) had reversed the order and judgment of Special Term, on the facts and law, and denied appellant's motion to dismiss the amended complaint. (A5-6)

The suit in question was brought by the Attorney General to secure defendant-appellant's removal as the Democratic Party's County Leader for the County of Kings in the State of New York. (A21) It is alleged that during the period of his party leadership appellant participated in commercial transactions with licensees of the New York State Racing and Wagering Board that are prohibited to political party officers by § 107 of New York's Pari-mutuel Revenue Law. (McK., Unconsol. Laws of New York, § 8052**). (A23, 28, 31)

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* Numbers in parentheses refer to appendix annexed to the Jurisdictional Statement.

** Although revised in 1980, subsequent to the institution of this litigation, the relevant sections remain intact but have been renumbered. See Jurisdictional Statement, pp. 3-6.

The Statute

Section 8052 provides, *inter alia*, that no political party officers, including county leaders (§ 8052, subd. 3[c]), shall conduct business with tracks licensed by the Racing Board. (J.S. pp. 3-5)* As horse racing in New York assumed the dimension of a state monopoly (*Gaynor* v. *New York State Harness Racing Comm.*, 32 Misc 2d 484 [Sup. Ct., West. Co., 1961], *aff'd.* 16 AD 2d 676 [2nd Dept., 1962], *aff'd.* 12 NY 2d 973 [1963]) and conflicts of interest were rife, it became necessary to insulate the state's licensees from political and public predators.

The governor's message of approval capsulized the scope of the Act's provisions as follows:

> "In substance they prohibited public officers . . . and party officers from:
>
> 1. Holding any license issued by the State Racing Commission . . . ;
>
> 2. Having any financial interest, direct or indirect in corporations or associations licensed by them . . . ;
>
> 3. Holding any office or employment with any racing association, its lessor, or any other enterprise operating at a race track which is licensed by either of the Commissions;
>
> 4. Selling goods or services to any of such organizations."

Public Papers of Governor Dewey, 1954, pp. 287-289; McKinney's Session Laws, 1954, pp. 1397-1398. The penalty for knowing and wilful violation is forfeiture of public

* Jurisdictional Statement.

or party office "at the suit of the attorney general" or ouster "by appropriate authority having the power of removal" (Unconsol. Laws, § 3052 subd. 2). (A4)

The Proceedings Below

The Attorney General's original complaint, *sub nom. Lefkowitz* v. *Esposito,* was dismissed at Special Term, Part I of the Supreme Court, New York County, for its failure to allege the statutory violations as "knowing and wilful", 99 Misc 2d 590 (1979). Leave to replead was granted because the court concluded that "plaintiff's affirmation demonstrates that there may be good ground to support the causes of action . . .", 99 Misc 2d at 593.

An amended complaint containing the necessary allegations as to knowledge and wilfulness was subsequently served and filed. (A21-34) Appellant, asserting that he wasn't the "county leader" but in reality chairman of the executive committee of the county committee, moved for dismissal of that complaint pursuant to New York CPLR 3211, subd. a, par. 1, claiming a defense based upon "documentary evidence". Special Term granted that relief having found that certain writings (the Kings County Democratic Party Rules) adduced by appellant disclosed that no triable issue existed that required a plenary trial. (A10) The party rules descriptive of the organization's hierarchy did not expressly provide for a party officer designated as the "county leader". (A8) Thereafter, an order dismissing the amended complaint was filed and a judgment was made and entered October 9, 1979. (A11-14) The Attorney General appealed.

The Appellate Division held that the party rules were not dispositive of the issue, i.e., whether or not appellant is the Democratic Party's Kings County Leader, and unanimously reversed, *Abrams* v. *Esposito,* 75 AD 2d 528 (1980). (A2-4) The motion to reargue was denied, but leave to appeal was granted by the Appellate Division, 76 AD 2d 764 (1980). (A18) The Court of Appeals affirmed (all concurring, except Judge Meyer who did not participate) for the reasons stated in the Appellate Division's memorandum.

The Appellate Division determined that:

> "Whether a party officer is subject to the prohibition of section 107 of the Pari-Mutuel Revenue Law depends on the functions he performs, the duties of the position, and not the title given to it. This method of statutory construction by functional analysis has been endorsed by the courts in actions involving the removal of civil servants from office and, by analogy, it is appropriate here. (See *Matter of Driscoll* v. *Troy Housing Auth.,* 6 NY 2d 513; *Matter of Mercer* v. *Dowd,* 288 NY 381; *Matter of Rohr* v. *Kenngott,* 288 NY 97)." 75 AD 2d 528 (1st Dept., 1980).

ARGUMENT

I

The judgments below rest on a non-federal ground.

The state courts construed a state conflict of interest statute to honor substance over form. The underlying question before them was whether the law applied to a political party officer who functioned as a "county leader". Their answer supported the holding that the party by-laws presented by appellant on motion did not settle the question whether he was, in fact, the "county leader". That appellation is a term of art in use throughout New York's political history, long recognized in law and life (cf. *Horn* v. *Burns and Roe,* 536 F 2d 251, 255 [8 Cir., 1976]; *Bellows* v. *Merchants Despatch Transp. Co.,* 257 App. Div. 15 [4th Dept., 1939], *affd.* 283 N.Y. 581 [1940]) and uniformly understood. See *People* v. *Cunningham,* 88 Misc 2d 1065, 1066-1067 (Sup. Ct., Bx. Co., 1976); *Theofel* v. *Sheridan,* 151 Misc. 713, 714 (Sup. Ct., Queens Co., 1934); W. Sayre and H. Kaufman, *Governing New York City,* pp. 70 *et seq.,* W. S. Norton Company, Inc., New York, 1960.

The state appellate courts did not, by any stretch of the imagination, broaden the well drawn, narrow statute, as appellant would have the Court believe. They did, however, refuse to allow the Act to be circumvented by party nomenclature masking the chief party officer's or "county leader's" true status within the party.

New York's courts turned, appropriately, to state experience (*Matter of Driscoll* v. *Troy Housing Auth.*, 6 NY 2d 513, 524 [1959]; *Matter of Rohr* v. *Kengott*, 288 N.Y. 97 [1942]; *Matter of Mercer* v. *Dowd*, 288 N.Y. 381 [1942]) to determine whether appellant's documentary evidence was sufficient to sustain dismissal of the complaint and found it wanting. The Appellate Division drew an analogy to the disposition of civil service removal cases, where the Court of Appeals has long been guided by the principle that their "decision must be controlled by 'the character of the duties required'" and not the title given to the position. *Driscoll*, at 524. This is simply a matter of state practice and forecloses this Court's review. *New York ex rel. Water Co.* v. *Maltbie*, 303 U.S. 158, 160 (1938); *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 211 (1935); see also, *Wilson* v. *Loew's Inc.*, 355 U.S. 597 (1958).

Appellant's fanciful issue, as stated in his Question Presented, was apparently never considered in the courts below, hence the Court is without jurisdiction to entertain the appeal even if the issue were not frivolous. *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); see also *McKeesport Area School District* v. *Penna. Dept. of Education*, 446 U.S. 970, 973 (1980); *Lynch* v. *New York ex rel. Pierson*, 239 U.S. 52 (1934).

The judgment below rests entirely on state grounds and must fall without the pale of this Court's jurisdiction. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977); *Jankovich* v. *Indiana Toll Road Comm.*, 379 U.S. 487, 491 (1965); *Herb* v. *Pitcairn*, 324 U.S. 113, 126 (1945).

II

The construction below presents no substantial federal question.

A. The result below was both logical and foreseeable.

In straining to create a situation in the *Bouie* mold, *Bouie* v. *City of Columbia*, 378 U.S. 347 (1969), appellant unlooses a freshet of rhetorical questions to underscore the hypothetical turmoil that might be generated by meaningful enforcement of an uncomplicated regulatory Act.* (J.S., p. 13) Appellant's misgivings are simply not reasonable when the application of the statute is considered in context. The Act in question was aimed at preventing conflcts of interest on the part of public and party officers within the narrow confines of New York's horse racing industry. *Public Papers of Governor Dewey, 1953*, pp. 506-507, 511-512; *Matter of Murtha* v. *Monaghan*, 1 AD 2d 178 (1st Dept., 1956), *affd.* 2 NY 2d 819 (1957), *rearg. den.* 3 NY 2d 880 (1957), *cert. den.* 355 U.S. 891 (1957). This intent is reflected in the statutory admonition that "party officers" shall not have interests in or do business with licensees of the Racing Board (§ 8052, subd. 1). Those party officers are later defined in the Act "to mean and include" certain political officers on the national, state and county levels (§ 8052 subd. 3[c]). All of the foregoing are the highest echelon, the political leadership.

Would the decision below foment indecision in the minds of the practicing politicians, the class targeted by

* § 8052 is part of the Pari-mutuel Revenue Law that provides the administrative framework for the regulation of horse racing in New York.

the statute? We agree that predictability of judicial interpretation of the laws is desirable because citizens must abide by those laws and should not have to guess their meaning. *Connolly* v. *General Construction Co.*, 269 U.S. 385 (1926). The relevant inquiry is, necessarily, not whether the decision below was foreseen, but whether the language of the statute or other factors made it reasonably foreseeable. *Franklin* v. *First Money*, 427 F. Supp. 66 (E.D. La., 1976), *aff'd.* 599 F.2d 615 (5th Cir., 1979).

There is, however, simply no *Bouie* issue here. New York's appellate courts did not enlarge the proscribed class but merely construed the statute according to the legislature's intent. Under that construction one cannot evade its restrictions by designating apples as oranges. Whether a particular politician is or is not subject to the Act has not been made mysterious by the decision in question. It cannot be seriously contended that one standing in appellant's shoes, a party professional, would fail to see the statute's application to him. The term, "county leader", has been in use throughout New York's political history; see p. 6, *ante*. To paraphrase *Kovacs* v. *Cooper*, 336 U.S. 77, 79 (1949), the title, through daily use, has acquired a content that conveys to any interested person a sufficiently accurate concept of its bearer's status and what is forbidden by the statute. There is no element of speculation fostered by the decision below. Cf. *Bouie* at p. 353.

This Court has noted that "[t]here is little doubt that imagination can conjure up hypothetical cases in which the meaning of [these] terms will be in nice question", *Communications Ass'n* v. *Douds*, 339 U.S. 382 (1950) at

412, but declared the applicable standard to be "the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important." *Id.*

Appellant has been amply forewarned of the scope of the Act with respect to the liabilities it visits upon him; the courts have long put politicians on notice that palpable conflicts of interest are abhorrent to the provisions of the Pari-mutuel Revenue Law. *Gaynor* v. *New York State Harness Racing Comm.*, 32 Misc 2d 484; *Maguire* v. *Monaghan*, 206 Misc. 550 (Sup. Ct., N.Y. Co., 1954), *aff'd.* 285 App. Div. 926 (1st Dept., 1955), *mot. for lv. app. den.* 285 App. Div. 1049 (1955); *Matter of Murtha* v. *Monaghan, supra.* Given the particular context of the statute, it gives " 'fair notice to those to whom [it] is directed.' " *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), at 112, quoting *Douds.* The construction below does not disturb the statutory scheme.

B. There is no First Amendment threat.

Appellant's First Amendment contention (J.S., pp. 16 *et seq.*) is so attenuated with respect to the situation at bar that it can have no constitutional significance. Neither section 8052 nor its application below stifles political activity at all. No protected First Amendment right is denigrated by making it unlawful for a politician to participate for profit in a governmental monopoly, in this case pari-mutuel racing (see *Gaynor* v. *New York State Harness Racing Comm., supra; Jacobson* v. *New York Racing Assn.*, 41 AD 2d 87 (2nd Dept., 1973), *mod. on other grounds*, 33 NY 2d 744 (1973). That is hardly in the field of political expression or association within the amendment's penumbra.

It is apparent from the Jurisdictional Statement that appellant has attempted to fashion a constitutional issue where none exists, consequently the lack of a substantial federal question calls for dismissal of this appeal. See *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52 (1934); *New York ex rel. Water Co.* v. *Maltbie*, 303 U.S. 158 (1938).

Conclusion

For the foregoing reasons, it is respectfully submitted that this appeal be dismissed.

Dated: New York, New York
February 5, 1982

Respectfully submitted,

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/s/ SHIRLEY ADELSON SIEGEL

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Appellant's Reply Brief

Office - Supreme Court, U.S.
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CLERK

No. 81-1324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MEADE H. ESPOSITO,

Defendant-Appellant,

v.

ROBERT ABRAMS,

Plaintiff-Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY TO MOTION TO DISMISS APPEAL

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APPENDIX—

Defendant's Brief in the Court of Appeals A1

No. 81-1324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MEADE H. ESPOSITO,

Defendant-Appellant,

v.

ROBERT ABRAMS,

Plaintiff-Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY TO MOTION TO DISMISS APPEAL

While the defendant-appellant is satisfied that the jurisdictional statement in this matter adequately rebuts the plaintiff-appellee's arguments in his motion to dismiss this appeal, this reply is necessary to clarify a confusing statement the plaintiff-appellee makes in his motion papers.

At page 7 of the appellee's motion to dismiss the appeal it is stated:

> Appellant's fanciful issue, as stated in his Question Presented, was apparently never considered in the courts below, hence the Court is without jurisdiction to entertain the appeal even if the issue were not frivolous. *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); see also *McKeesport Area School District* v. *Penna. Dept. of Education*, 446 U.S. 970, 973 (1980); *Lynch* v. *New York ex rel. Pierson*, 239 U.S. 52 (1934).

This statement seems to imply that the issue was not timely raised. This is simply not the case.

The defendant-appellant raised the question of the constitutionality of the construction imposed on Section 8052 of the New York Unconsolidated Laws by the Supreme Court of the State of New York, Appellate Division, First Department at every appellate level.

Indeed, as an examination of the brief on appeal in the Court of Appeals of the State of New York reveals, not only was the issue timely raised, but it would have been virtually impossible for the Court of Appeals not to have considered this issue since it was the principal issue raised on appeal and was the focus of oral argument. (A1)

CONCLUSION

Wherefore, it is respectfully submitted that the plaintiff-appellee's motion to dismiss the appeal in this matter should be denied.

Dated: February 9, 1982

Respectfully submitted,

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APPENDIX

Defendant's Brief in the Court of Appeals

COURT OF APPEALS
STATE OF NEW YORK

ROBERT ABRAMS, Attorney General of the State of New York,

Plaintiff-Respondent,

—against—

MEADE H. ESPOSITO,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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QUESTIONS PRESENTED

I. Must Section 8052 of the Unconsolidated Laws Be Strictly Construed and Applied or Should It Be Broadly Interpreted Through a "Functional Analysis" Approach Which Would Result in Its Application to Offices Which Are Not Enumerated in the Statute?

The Appellate Division, First Department, Held That Section 8052 Should Be Broadly Construed And Applied.

II. Was the Documentary Evidence, Submitted by the Defendant in Support of His Motion to Dismiss, Competent Proof to Establish His Title and Position and, Therefore, His Defense to the Complaint?

The Appellate Division, First Department, Felt That Insofar As The Statute Should Be "Functionally Analyzed" The Defendant's Title Or Position Was Irrelevant.

Appendix

STATEMENT OF THE FACTS

The complaint forming the basis of this action was served on the defendant-appellant (hereinafter "the defendant"), Meade Esposito, on April 4, 1979. (A02) The defendant moved for dismissal of the complaint pursuant to CPLR §3211(a)(1), (7) and (c). (A20) The plaintiff-respondent (hereinafter "the plaintiff") responded (A182; A295) and the defendant replied. (A324) By decision dated July 16, 1979, Justice Alvin F. Klein, Justice of the Supreme Court, New York County, sitting in Special Term, Part I, dismissed the complaint. (A353)

The plaintiff appealed to the Appellate Division, First Department, (A358; A452) and the defendant filed his opposing brief. (A409) On April 18, 1980, the Appellate Division reversed the decision of Special Term. (A468) The defendant then moved for reargument and, in the alternative, for permission to appeal to the Court of Appeals. (A472) The plaintiff opposed this motion. (A492; A494) On June 10, 1980, the Appellate Division granted permission to the defendant to appeal to the Court of Appeals. (A01)

The complaint which formed the basis of the present action sought the same relief in five causes of action: to wit, that the defendant Esposito be caused to forfeit the office of "County Leader of Kings County" pursuant to section 8052 of the Unconsolidated Laws. Section 8052 of the Unconsolidated Laws prohibits, *inter alia*, enumerated party officers from having any interest in pari-mutuel racing activities. The plaintiff alleged that the defendant had violated this statute because Mr. Esposito, owned more than ten percent of the stock of Serres, Visone & Rice, Inc., an insurance brokerage firm, and that this firm had ob-

tained insurance policies for a licensee of the New York State Racing and Wagering Board. (A03) The defendant denied that this company had ever served as agent or received commissions for a facility licensed to conduct parimutuel racing.

As will be developed more fully in the following points of law, the defendant asserted at Special Term that, because this statute (§8502) contained as its exclusive remedy "forfeiture of office", was otherwise known at common law and was *malum prohibitum* vis-a-vis *malum in se*, the rules governing statutory interpretation required strict construction and application. Accordingly, documentary evidence was offered to establish that the defendant held none of the offices specifically enumerated in the statute.

The crux of the instant appeal therefore deals with the issue of whether Special Term properly dismissed plaintiff's complaint upon the grounds that, strictly applying this statute, the documentary evidence which defendant offered pursuant to CPLR §3211(a)(1) established that he did not hold the office of the County Leader of the County of Kings, that no such position even existed, and that, therefore, a complete defense to the complaint existed.

The documentary evidence which was presented was, in part, the "Official Rules for the Government of the Democratic Party of Kings County". (A127; A141; A154) The defendant contended that these official records, on file with the Board of Elections of the City of New York, the Office of the Secretary of State and the New York State Board of Elections, conclusively established that Meade Esposito did not hold the office of "County Leader" of the County of Kings. That is that Mr. Esposito did not hold any position enumerated in Section 8052 of the Unconsolidated Laws.

Justice Alvin F. Klein, Justice of the Supreme Court, New York County, sitting in Special Term, Part I, adopted

the arguments advanced by the defendant and dismissed the plaintiff's complaint. (A353) In his decision, Justice Klein concluded that §8052 of the Unconsolidated Laws had to be "strictly construed" and applied.[1] Thus, on the basis of the documentary evidence submitted by the defendant, the court found that Mr. Esposito did not hold the office of County Leader of Kings County and, therefore, was not a person who held a position enumerated within §8052 of the Unconsolidated Laws. (A355) Plaintiff's complaint was accordingly dismissed pursuant to CPLR §3211(a)(1).

Exclusive of the pleadings and the documentary evidence offered in support thereof, there were no other proceedings at which any proof was received, nor were any additional findings of fact made by Special Term.

On appeal the plaintiff argued that the defendant's status in his party should be determined by analyzing the functions he performs, rather than by his title. (A381-A384) The Appellate Division, in reversing Special Term, approved "this method of statutory construction by functional analysis" (A471) and held that under this view the documents submitted were not dispositive of the issue of whether the defendant was a county leader.

The defendant, in his motion for reargument and/or permission to appeal to the Court of Appeals, pointed out that application of this so-called "functional analysis" would

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[1] The complaint at issue is an amended complaint. The original complaint was also dismissed at Special Term; however leave to replead was granted. It is of import to note however that Justice Kassal, who dismissed the original complaint, also held that this statute demanded strict construction and application. As Justice Kassel wrote: "First it is a statutory cause of action, unknown at common law, and hence, the pleading must be measured carefully only against the template of the specific statute. . . Second it is a forfeiture and punitive in nature and must be strictly construed and applied." (A507)

raise serious vagueness problems violative of both the New York State and the United States constitutions. (A472)

In granting the plaintiff's motion for permission to appeal to the Court of Appeals, the Appellate Division pronounced that its determination was made as a matter of law, not in the exercise of discretion, and certified the following question for review:

> Was the order of this Court, which reversed the order of the Supreme Court, properly made?

Accordingly, the instant appeal focuses principally upon the issue of whether the Appellate Division was correct in determining that this statute should be broadly applied via a functional analysis approach or whether the defendant's claim that statutes of this nature require strict application —lest they run afoul of the constitutional proscriptions against vagueness—should prevail.

POINT I

THE APPELLATE DIVISION ERRED IN FINDING THAT A "FUNCTIONAL ANALYSIS" APPROACH SHOULD BE EMPLOYED TO DEFINE THE OFFICES ENUMERATED IN SECTION 8052 OF THE UNCONSOLIDATED LAWS.

Section 8052 of the Unconsolidated Laws prohibits certain political "party officers" from having specified interests in pari-mutuel racing activities.[2] Subdivision 3(c)(3) of that statute defines "party officer" in this manner:

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[2] Section 8052, subsection 1 of the Unconsolidated Laws, provides in relevant part:

> No public officer, public employee or party officer shall:
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> * * *
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> (b) own or hold, directly or indirectly, any proprietary interest, stock or obligation of any firm, association or corporation

(3) A county leader, chairman, vice-chairman, counsel, secretary or treasurer of a county committee.

The plaintiff alleged in his complaint that the defendant had functioned as the "County Leader of the Democratic Party in Kings County" and further alleged that, because the defendant once possessed an interest in pari-mutuel racing activities,[3] he should forfeit this post. (A03)

Justice Alvin F. Klein of the Supreme Court, New York County, disagreed with the plaintiff, finding on the basis of documentary evidence that the defendant held the post

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(1) which is licensed by any of such commissions to conduct pari-mutuel racing, or (2) which is licensed to conduct its occupation, trade, or business at race tracks at which pari-mutuel race meets are conducted, or (3) which owns or leases to any licensed association or corporation a race track at which pari-mutuel racing is conducted, or (4) which participates in the management of any licensee conducting pari-mutuel racing; or

* * *

(d) sell (or be a member of a firm, or own ten per centum or more of the stock of any corporation, which sells) any goods or services to any firm, association or corporation specified in paragraph (b) of this subdivision.

[3] The plaintiff alleges that Mr. Esposito had such an interest because he is a member of an insurance firm, Serres, Visone & Rice, Inc., that this company obtained insurance policies for the Parr Meadows Racing Association, Inc. and that commissions were paid to the company for obtaining these policies. (A03) However, as the plaintiff well knows, before this suit was even initiated, on January 12, 1978, Mr. Joseph Martuscello, an officer of Serres, Visone & Rice, Inc., answered a subpoena *ad testificadum/duces tecum* and appeared before Elliot S. Greenspan, Assistant Attorney General of the State of New York, to give sworn testimony. Mr. Martuscello's unchallenged and uncontested testimony categorically established that the insurance policy for Parr Meadows was obtained in Martuscello's individual capacity, that he (Martuscello) personally received the commission for the policy, and that neither Serres, Visone & Rice nor Mr. Esposito had ever shared in this commission. (A172-A178)

of "Chairman of the Executive Committee of the Kings County Democratic Committee". (A355) Holding that §8052 of the Unconsolidated Laws had to be strictly construed and applied because, *inter alia*, it imposed a forfeiture, Justice Klein ruled that "[t]he party position held by defendant does not fall within Section 8052, subd. 3(c)(3)" and dismissed the complaint. (A355)

On appeal, the Appellate Division, First Department, reversed the decision of the court below holding that a "functional analysis" should be applied to Section 8052 and that under this analysis "the document offered in defense not dispositive of the issue of whether defendant is the county leader." (A471)

It is submitted that the Appellate Division erred in reversing the order of Special Term for a number of reasons. Firstly, the Appellate Division's holding that a "functional analysis" be employed in interpreting Section 8052 of the Unconsolidated Laws subjects that statute to grave vagueness problems. Secondly, because the statute imposes a forfeiture, is unknown at common law and is *malum prohibitum*, the rules of statutory construction require that it be strictly construed and applied.

a. *The Appellate Division's Determination That Section 8052 Of The Unconsolidated Laws Should Be "Functionally Analyzed" Would Subject the Statute To Vagueness Problems of Constitutional Proportion.*

The due process clause of the Fourteenth Amendment to the United States Constitution, as well as Article I, Section 6 of the Constitution of the State of New York, require that an enactment be struck as void if its prohibitions are so vague as to fail to apprise a citizen of ordinary intelligence who shall be subject to the statute

and what conduct is proscribed. *People* v. *Lang*, 36 N.Y.2d 366, 368 N.Y.S.2d 492 (1975); *People* v. *Goodman*, 31 N.Y. 2d 262, 338 N.Y.S.2d 97 (1972); *People* v. *Caswell-Massey Co.*, 6 N.Y.2d 497, 190 N.Y.S.2d 649 (1959). The United States Supreme Court articulated the reasons for this rule in *Grayned* v. *City of Rockford*, 408 U.S. 104, 109-110, 92 S.Ct. 2294, 2298-92 (1972):

> Vague laws offend several important values. First because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.
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> Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked." (Footnotes omitted.)[4]

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[4] While *Grayned* involved construction of a criminal statute, the vagueness problem has equal applicability in civil law (especially where a statute incorporates severe penalties, such as forfeiture). It applies to any law, civil or criminal, which requires or prohibits

It is submitted that the Appellate Divisions' determination that "functional analysis" can be applied to determine who is a "county leader", as that term is used in Section 8052 of the Unconsolidated Laws, would controvert each of the standards protected by the due process prohibition against vagueness. See generally, *Cramp* v. *Board of Public Instruction of Orange County, Fla.*, 368 U.S. 278, 287, 82 S.Ct. 275, 280-281 (1961).

While it is true that the vagueness challenge is typically raised in the context of the language of a statute, in the instant case the statute is admirably narrow and precise. Thus, in the present instance, the objection raised is to the *application* imposed by the Appellate Division and not to the statute's language. As the Supreme Court acknowledged in *Bouie* v. *City of Columbia*, 378 U.S. 347, 352-353, 84 S.Ct. 1697, 1701-1702 (1964):

> [There is] a potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical "void for vagueness" situation. When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it

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certain behavior. *Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 45 S.Ct. 295 (1925); *Fleuti* v. *Rosenberg*, 302 F.2d 652 (9th Cir. 1962). It is not a criminal penalty that is invalid in such situations, "but the exaction of obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all." *Small Co., supra*, 267 U.S. at 239.

> lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required "to speculate as to the meaning of penal statutes," . . . or to "guess at [the statute's] meaning and differ as to its application," . . . the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.
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> Indeed, an unforeseeable judicial enlargement of a . . . statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, §10, of the Constitution forbids.

Turning to the first objection to vague laws—i.e., "that a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application"—it is respectfully suggested that the Appellate Division's finding that an unspecified and unregulated "functional analysis" should be superimposed upon the language of §8052 would violate due process principles. *Baggett* v. *Bullitt*, 377 U.S. 360, 367, 84 S.Ct. 1316, 1320 (1964). Accord, *People* v. *Cruz*, 48 N.Y.2d 419, 423 N.Y.S.2d 625 (1979); *People* v. *Lang*, 36 N.Y.2d 366, 368 N.Y.S.2d 492 (1975); *People* v. *Goodman*, 31 N.Y.2d 262, 338 N.Y.S.2d 97 (1972); *People* v. *Caswell-Massey Co.*, 6 N.Y.2d 497, 190 N.Y.S.2d 649 (1959); *T.L.C.*

Medical Transportation Services, Inc. **v.** ***Commissioner of Dep't of Health,*** **66 A.D.2d 999, 412 N.Y.S.2d 70 (4th Dep't 1978);** ***Newsday, Inc.*** **v.** ***Town of Huntington,*** **—— Misc.2d ——, 426 N.Y.S.2d 409 (Sup. Ct., Suffolk Cty. 1980);** ***People*** **v.** ***Paperno,*** **98 Misc.2d 99, 413 N.Y.S.2d 975 (Sup. Ct., N.Y. Cty. 1979).**

Under the Appellate Division's "functional analysis", how would any individual know whether he was acting as a "county leader" within the meaning of the statute? What party posts would be subject to the proscriptions of this law? Even if an individual held but a minor party post, or no party position at all, under the Appellate Division's present decision, could one nonetheless be found, through "functional analysis", to be the equivalent of a "county leader"; and how much involvement would be too much?

Not only would persons of ordinary intelligence have difficulty trying to answer these questions, but so would members of the bar. Suppose an attorney was consulted by his client and told: "I am not the County Leader of this county, although I do perform certain activities which could be construed to be similar to those performed by a 'County Leader'. I have been offered a position as Vice President of a local race track licensed to conduct pari-mutuel racing events. Can I accept the position or not?"

The attorney would frankly be unable to counsel his client effectively. Of course he could explain the concept of "functional analysis"—but when his client asked "what are the standards; what conduct is too much; what conduct can be safely pursued so that the statute will not be triggered" —the attorney would once again be without an effective answer. It is respectfully asserted that if the application of a statute is so undefined that a member of the bar could not effectively counsel his client as to the state of the law, such

an application must, self-evidently, run afoul of the due process proscription against vagueness.

The Appellate Division has directed that a "functional analysis" be applied to Section 8052, but this direction fails to answer any of the self-evident problems that would arise in the course of such an analysis. For example, who should undertake such an analysis: the court, counsel, the plaintiff? How will the decision be made: as a matter of law, as a matter of fact or both? Who should make this decision —the judge or the jury? When will this decision be made: during the pretrial proceedings, at a hearing, or during a trial on the merits? What will the burden of proof be? Who will carry the burden of going forward or of persuasion on the issue? Is it an essential element of the plaintiff's case or an affirmative defense to be proposed by the defendant? The questions are endless.

Clearly, the Appellate Division's "functional analysis" approach provides no notice, nor ascertainable standards by which the bar may be informed (much less the citizenry) of what actions will give rise to a finding that someone has acted as a "county leader". Accordingly, it is respectfully asserted that the Appellate Division's interpretation of Section 8052 renders the statute unconstitutionally vague in that it provides no notice.

Applying the concept of "functional analysis" to Section 8052 also triggers the constitutional dilemma created when the application of a statute results in the loss of ascertainable standards for determining the merits of the controversy. As Mr. Justice Black stated in the decision in *Giaccio* v. *State of Pennsylvania,* 382 U.S. 399, 402-3, 86 S.Ct. 518, 520-521 (1966):

> It is established that a law fails to meet the requirements of the due process clause if it is so vague and

> standardless that it leaves the public uncertain as to the conduct it prohibits or *leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.* (Emphasis supplied.)

See, *Goguen* v. *Smith*, 471 F.2d 88, 95-96 (1st Cir. 1972).

In the instant case, who is a "county leader" within the meaning of Section 8052 is left to the whims and vagaries of individual decision making. It is no answer that appellate review will rectify all errors, for, not only are there similarly no standards by which appellate judges can make this determination, but once a political party post is forfeited, who can guarantee that it will be regained? Further, who can compensate the defendant for his time, for the cost of litigation and for the damage to his reputation?

Since no standards or definitions are provided by Section 8052 (or by any other statute, law, act, rule, regulation, guideline, or even by the appellate court's decision) to assist one in determining who is a county leader, it must be assumed that the Legislature meant the statute to apply only to persons holding the offices specifically enumerated therein. If in fact the Legislature intended that the term "county leader" be interpreted functionally, then the statute must be redrafted to reflect their intent.[5] This is paricularly true since the traditional interpretation of *malum prohibitum* statutes, which involve forfei-

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[5] Section 74 of Statutes states:

> A court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended.

tures, is strict rather than expanded construction and/or application.

It is respectfully contended that it is not the judiciary's role to impose a "functional analysis" in the absence of any defined standards as to what will form the basis for such analysis. Self-evidently, the law as presently interpreted provides neither notice of the prohibited conduct, not standards to be applied by judge or jury. Section 8052 as it has been interpreted by the Appellate Division, violates due process of law for both of these reasons.

Another due process difficulty which arises in the context of this case is the fact that the breadth of the application suggested by the Appellate Division creates an impermissible infringement upon constitutionally protected areas. As the Supreme Court stated in *Smith* v. *Goguen*, 415 U.S. 566, 574, 94 S.Ct. 1242, 1247 (1974):

> Where a statute's . . . scope . . . is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.

Accord, *Grayned, supra; Baggett, supra,* at 84 S.Ct. 1321. The court below had phrased the problem slightly differently:

> [T]here is a greater solicitude that courts have, and ought to have, about the fear-inducing effect of any law which, by its very scope constitutes a broad-gauged potential sanction against many who would seek to express themselves. So many cases have concerned themselves with this kind of anticipatory and open-ended threat of retaliation that a . . . jargon has crept into our jurisprudence . . . [a] "chilling effect". . .

> We have viewed the Massachusetts statute under which appellee was punished and have determined that it cuts a swath far beyond the individual defendant whose conduct is sought to be penalized. It is a double-edged sword of Damocles not only menacing the exercise of constitutional freedoms, but also serving to obstruct any future adjudications with regard to unknown, innumerable other individuals who may, because of the breadth of the statute, forego asserting their rights under fear of criminal prosecution and punishment.

Goguen v. *Smith*, 471 F.2d 88, 96-97 (1st Cir. 1972). Cf. *In Re Primus*, 436 U.S. 412, 98 S.Ct. 1893 (1978); *Greene* v. *Sinclair*, 491 F.Supp. 19 (W.D. Mich. 1980).

The underlying vagueness of the interpretation imposed by the Appellate Division may very well cause citizens to avoid performing activities which are, in fact, constitutionally protected. Absent compelling state interests to the contrary, an individual's political activities enjoy full First Amendment protection. See, *Gibson* v. *Florida Legislative Investigation Commission*, 372 U.S. 539, 83 S.Ct. 889 (1963); *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 83 S.Ct. 328 (1963).[6] Now, however, confronted with the inexplicit construction accorded Section 8052, individuals may choose to forego otherwise lawful political activities, for fear that their participation may later subject them to expensive, time-consuming litigation that could damage

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[6] In addition, the constitutional right to contract would also be imparied and, absent some rational basis, such impairment is unconstitutional. United States Constitution, Article I, Sec. 10; Cf. *Home Building and Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 54 S.Ct. 231 (1934).

their reputations.[7] Self-censorship of this nature unduly infringes upon important First Amendment rights and results in an impermissible chill of lawful political activities. See, *Dombrowski* v. *Pfister,* 380 U.S. 479, 468, 85 S.Ct. 1116, 1120 (1965).

Thus, because individuals confronted with the present interpretation of Section 8052 will likely be chilled from asserting their rights, it is submitted that applying this statute through a "functional analysis" violates not only the Fourteenth, but the First Amendment to the United States Constitution as well.

Further, it is respectfully contended that the cases cited by the Appellate Division, in support of its assertion that "functional analysis" should be applied are not compelling. (A471) See, *Driscoll* v. *Troy Housing Authority,* 6 N.Y.2d 513, 190 N.Y.S.2d 663 (1959); *Mercer* v. *Dowd,* 288 N.Y. 381, 43 N.E.2d 452 (1942); *Rohr* v. *Kenngott,* 288 N.Y. 97, 41 N.E.2d 905 (1942). In all three of these cases the Court of Appeals was not employing a functional analysis approach to remove someone from office, but, rather, to maintain them in office. Furthermore, it is questionable whether the *Driscoll* case relies on a "functional analysis" at all. Rather, the Court in *Driscoll*

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[7] The availability of declaratory judgment actions, Article seventy-eight proceedings, and Attorney General's Opinions are no answer to this problem. In fact, this argument serves only to emphasize the fact that there will be a chilling effect. The First Amendment does not contemplate delay or resort to judicial proceedings to vindicate the rights it protects. Nor does it tolerate resort to Attorney General's Opinions to instruct one's action or speech. The essence of the First Amendment protection is the right to act immediately, not to wait for approval from some governmental body. In fact, the assertion that an Attorney General's Opinion is available is somewhat absurd. It is the Legislature that must define laws, not the executive branch.

would seem to have relied on documentary evidence, that is, a "roster card" which indicated that Driscoll was appointed to a particular civil service position, which required a hearing before he could be removed from office.

In summary, as the District of Columbia Circuit Court of Appeals so eloquently stated in *Ricks* v. *District of Columbia*, 414 F.2d 1097, 1100-1101 (D.C. Cir. 1968):

> Reasonable precision in . . . definition . . . has been regarded as a desideratum by free people since the early days of the common law. That precept, virtually from the birth of the Nation, has occupied a position of honor in the scheme of constitutional values, and for justifications of the highest order [sic]. Fluid language which sweeps citizens under the penumbra of . . . legislation without warning is abhorrent. The imposition of . . . liability for behavior which a person could not reasonably understand to be prohibited offends the most rudimentary considerations of fairness. "No one may be required at peril of life, liberty or property to speculate as to the meaning of . . . statutes. All are entitled to be informed as to what the State commands or forbids." Thus "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process."
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> Since most people shy away from legal violations, personal liberty is unconstitutionally dampened when one can but doubt whether he is actually free to pursue particular conduct. Moreover, definitional uncertainty

> is an open invitation, if indeed not inevitably an antecedent, to virtually unrestrained administration.
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> So it is that a . . . statute perishes on constitutional grounds when it leaves speculative the tests for ascertaining the line separating guilty from innocent acts. (Footnotes omitted.)

If the finding of the Appellate Division is not reversed by this Court, not only will the position of County Leader be subject to functional analysis, but so too will all of the other enumerated positions. Any individuals who perform tasks similar to the positions listed in the statute must now be concerned that through "functional analysis" they too will be the subject of forfeiture proceedings.

b. *The Rules For Statutory Construction Require That §8052 Of The Unconsolidated Laws Be Strictly Construed.*

It is respectfully submitted that strict construction and application of Section 8052 of the Unconsolidated Laws must be applied in this case. As the Appellate Division, Third Department stated in *Nik-o-lok Co.* v. *Carey*, 52 A.D.2d 375, 384 N.Y.S.2d 211, 213 (3rd Dep't 1976), aff'd 40 N.Y.2d 1089, 392 N.Y.S.2d 393 (1977):

> [I]t is not this Court's function to question the wisdom of any particular legislative act, or to comment on the quality of its draftsmanship. We must adhere to established rules of construction and tests for constitutionality. In this setting, due process requires that a statute inform those subject to its terms of the nature of the prohibited conduct and what is required of them.

Accord, *Andrus* v. *Glover Construction Co.*, —— U.S. ——, 100 S.Ct. 1905 (1980); *Golden* v. *Koch*, —— Misc.2d ——, 415 N.Y.S.2d 330 (Sup. Ct. N.Y. Cty.), rev'd on other grounds 73 A.D.2d 575, 423 N.Y.S.2d 165 (1st Dep't 1979), aff'd 49 N.Y.2d 690, 427 N.Y.S.2d 780 (1980).

It is a well settled principle of construction that statutes which are in derogation of the common law and which contain punitive and/or forfeiture provisions must be strictly construed and applied.[8] *Transit Commission* v. *Long Island R. Co.*, 253 N.Y. 345, 171 N.E. 565 (1930); *Cracco* v. *Cox*, 66 A.D.2d 447, 414 N.Y.S.2d 404 (4th Dep't 1979); *Marsh* v. *LaMarco*, 75 Misc.2d 139, 351 N.Y.S.2d 253 (Sup. Ct., Suffolk Cty. 1973) aff'd 46 A.D. 2d 888, 361 N.Y.S.2d 691 (2d Dep't 1974); aff'd *sub nom* 39 N.Y.2d 397, 384 N.Y.S.2d 128 (1976); *Rocha* v. *State*, 45 A.D.2d 633, 360 N.Y.S.2d 484 (3d Dep't 1974); *Tilboro Home Builders, Inc.* v. *Leidel*, 42 A.D.2d 578, 344 N.Y.S.2d 614 (2d Dep't 1973), rev'd on other gnds 35 N.Y.2d 347, 361 N.Y.S.2d 895 (1974).

The reason for this rule becomes apparent when one examines the source of the common law. As the Supreme Court stated in *Western Union Teleg. Co.* v. *Call Publishing Co.*, 181 U.S. 92, 102, 21 S.Ct. 561, 564 (1901):

> What is the common law? According to Kent: "The common law includes those principles, usages, and rules of action applicable to the government and secu-

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[8] Black, in the second edition of "Interpretation of Laws" at section 137, states:

> [T]he rule of strict construction of these statutes means that, as between the state, prosecuting or seeking to enforce a penalty or forfeiture, and the party sought to be charged, the construction must be strict against the state and favorable to the innocence, liberty or rights of the defendant.

> rity of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature." 1 Kent, Com. 471. . . In Black's Law Dictionary, page 232, it is thus defined: "As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England."

In other words, the common law is law which has developed as a result of what men of common understanding and experience perceive the law to be, i.e., that the law will prohibit conduct one would expect the law to prohibit (acts which are *malum in se*) and does not prohibit conduct one would otherwise perceive to be inoffensive to society.

Thus, the purpose of the rule requiring strict construction of statutes in derogation of the common law is evident. Since the common law proscribed only those actions one would consider wrong from a common-sense point of view, all subsequent prohibitions that infringed upon actions which people of common experience anticipated were lawful, should be narrowly construed. This is true for two reasons. First, there is the problem of notice; that is, citizens do not ordinarily expect, or have notice, that previously lawful conduct has been declared unlawful. Second is the concept dealing with the constitutional mandate that

rights not otherwise abridged by the government are reserved to the People. (Amendment 10, U.S. Const.) Citizens must therefore be able to rely upon the specific language of the statute to determine if their rights have been abridged. Absent language in a statute which, on its face, specifically applies to them, a citizen should feel secure in relying upon his "reserved" rights and freedoms guaranteed by the Constitution.

Thus, Section 311 of *Statutes* in Book 1, *McKinney's Consolidated Laws* states:

> An act which infringes upon a common right is strictly construed. It is a presumption that the legislature did not intend to interfere with the common rights of mankind, and any interference must, therefore, be expressed, not left to implication. Similarly, statutes passed in the exercise of the police power of the state, restricting and regulating property rights or the pursuit of lawful occupations and callings, should be strictly construed.[9]

By virtue of the fact that Section 8052 aletrs the common law and creates a prohibition against "otherwise legal activity," it must be narrowly construed and applied.

A related rule of construction also supports this view. Section 8052 of the Unconsolidated Laws is a statute which is *malum prohibitum* and not a statute which is *malum in se*. As this Court held in *People* v. *Vetri*, 309 N.Y. 401, 131 N.E.2d 568 (1955), statutes whose "provisions [are] *malum*

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[9] Indeed the right to contract is specifically guaranteed by the United States Constitution, to wit: "No State shall . . . pass any law impairing the obligation of contracts." Article I, Sec. 10. Cf. *Home Building and Loan Ass'n.* v. *Blaisdell*, 290 U.S. 398, 54 S.Ct. 231 (1934).

prohibitum and not ***malum in se*** . . . should be strictly construed." Accord, *People* v. *Taylor*, 192 N.Y. 398, 400, 85 N.E. 759 (1908); *People* v. *Werner*, 174 N.Y. 132, 66 N.E. 667, 668 (1903). Of course, this rule rests on the same foundation as the rule of strict construction applied to laws which are in derogation of the common law.

Because the law abhors expansion of a statute beyond the clear language of the Legislature, to punish conduct which is otherwise protected, Section 8052 of the Unconsolidated Laws must be construed to apply only to those offices specifically enumerated in the statute. Any use, therefore, of a so-called "functional analysis" to define the offices listed would be error and offensive not only to settled rules of statutory construction and application but also to constitutional guarantees.

c. *"Functional Analysis" Applied To This Statute Would Result In Grave Enforcement Problems.*

The plaintiff's complaint prayed that the trial court declare that the defendant "forfeit his party office of County Leader of the Democratic Party for the County of Kings, State of New York, and that he [be] disqualified from holding such party office and [be] ordered removed from said party office." (A18-A19)

How, however, would it be possible for a court to issue an order directing the defendant to forfeit the office of "County Leader of Kings County" since he does not hold that title? What would the effect of such an order be? With all due respect to the authority and process of the courts of our state, such an order would do nothing more than promote confusion and uncertainty. What would be the effect of such an order upon the defendant's activities?

What acts or conduct, if any, would he be compelled to refrain from doing? What would be the effect of such an order on his position as Chairman of the Executive Committee of the Kings County Democratic Committee? Would he have to cease all activities associated with that position or only those that had been "functionally analyzed" to be similar to those of a county leader; could he be reelected or reappointed; how soon?

It is a well settled equitable maxim that, "equity will not suffer the making of a vain order". *Livoti* v. *Elston,* 52 A.D.2d 444, 384 N.Y.S.2d 484 (2d Dep't 1976); *Pennington* v. *Ziman,* 13 A.D.2d 769, 216 N.Y.S.2d 1 (1st Dep't 1961); *Weiner* v. *Pruzan,* 13 Misc.2d 668, 172 N.Y.S.2d 287 (Sup. Ct. Kings Cty. 1958). This maxim is premised upon the principle that judicial orders should be sufficient, precise and definite. This is to ensure that the parties who are subject to a judicial order can know what conduct is permitted or prohibited. Enforcement of such orders, should they be disobeyed, can be effected without resort to a contest over who the order applied to and what conduct, if any, was proscribed. Surely the order which is sought through the plaintiff's complaint is a "vain order", for not only is the defendant not the "County Leader of Kings County", but, as indicated, no such position even exists.

POINT II

THE COURT AT NISI PRIUS PROPERLY DISMISSED THE INSTANT COMPLAINT ON THE GROUND THAT A COMPLETE DEFENSE EXISTED BASED ON DOCUMENTARY EVIDENCE (CPLR 3211[a]1).

a. *The Verity And Conclusiveness Of The Proffered Documents Cannot In Good Faith Be Reasonably Challenged; Moreover, Respondent Waived The Ability To Challenge The Authenticity Of The Documents Relied Upon By Special Term.*

In the Appellate Division the plaintiff attacked the nature and competency of the documentary evidence which was relied upon by the trial court in dismissing the complaint.[10] It is respectfully asserted that no genuine issue was raised by the plaintiff with regard to the competency of the proof proffered at *nisi prius*.

Although the plaintiff asserted that there was reason to question the "verity" and the "conclusiveness" (A388) of the evidence presented to the trial court, conspicuously absent were any facts in his brief to substantiate these wholly unfounded and improper contentions. If the plaintiff is suggesting that the rules submitted by the defendant were in some manner "forgeries" or were otherwise documents of questionable truthfulness, he is invited to say so directly.

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[10] Notwithstanding the plaintiff's brief in the Appellate Division, it is quite clear that Special Term relied on *all* of the documentary evidence proffered by the defendant and not exclusively on the "Rules for the Government of the Democratic Party of Kings County" (A355). Presumably, the remainder of the documentary evidence was found satisfactory by the plaintiff since his arguments below only addressed the issue of the "Rules". Consequently, defendant's response will be limited to the nature and character of this evidence.

There can be no doubt that the rules which were submitted to the trial court were official and were an accurate reproduction of the rules files by the Kings County Democratic Party with the New York State Board of Elections. (See, Election Law §2-114.) Indeed, Special Term found, as a matter of fact, that the Rules of the Democratic Party of Kings County were "official documents on file with the Board of Elections of Kings County (Election Law §2-114, subd. 1)" (A355) and prior thereto with the New York City Board of Elections and the Secretary of State.

Similarly, there can be no question as to the "conclusiveness" of these rules. Plaintiff simply fails to focus upon the meaning of the term "conclusiveness." At this point it is obvious that it has been the plaintiff's contention throughout this action that he thinks Mr. Esposito acts like a "County Leader" and, therefore, should be deemed to be a "County Leader". This argument, however, has nothing to do with the issue of the "conclusiveness" of the rules for the purpose tc which they were applied by the trial court.

Whether the respondent agrees or not, Justice Klein found as a matter of law, that §8052 of the Unconsolidated Laws was a statute which required strict construction and application. So finding, the court turned its inquiry to the question of whether or not the defendant was a person who held an office or position which was expressly enumerated by the Legislature in §8052. On the basis of the rules, the court determined that Mr. Esposito was not in fact the "County Leader" of Kings County, but was rather the "Chairman of the Executive Committee of the Kings County Democratic Committee".

Thus the question regarding the "conclusiveness" of the rules has nothing to do with the so-called "functional analysis" which was rejected by the trial court. Rather, these

rules were offered to show only one factor, that is, that Mr. Esposito did not hold the title of "County Leader" but rather held the title of the "Chairman of the Executive Committee of the Kings County Democratic Committee". These rules conclusively establish that fact.[11]

b. *The "Party Rules" Are Clearly Documents Within The Contemplation Of CPLR 3211(a)1.*

Rule 3211(a)1 of the New York Civil Practice Law and Rules provides:

> Motion to Dismiss a Cause of Action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that a defense is founded upon documentary evidence.

Although there is not an extensive body of law surrounding this provision, it is unquestionably the law of this state that a liberal interpretation is to be given to the term "documentary evidence". *Gauthier* v. *Gabel,* 44 Misc.2d 887, 255 N.Y.S.2d 200 (Sup. Ct. N.Y. Cty. 1964), aff'd 16 N.Y.2d 720, 262 N.Y.S2d 105 (1965); *Levine* v *Behn,* 169 Misc. 601, 8 N.Y.S.2d 58 (Sup. Ct. N.Y. Cty. 1938), aff'd 257 App. Div. 156, 12 N.Y.S.2d 190 (1st Dep't 1939), rev'd on other grounds 282 N.Y. 120 (1940). There is nothing in Rule 3211 which specifies or limits the form or character of the documentary evidence or official record upon which the motion may be based. 4 Weinstein, Korn, Miller, *New York Civil Practice,* ¶3211.06 at 32-40 (1979).

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[11] The Court will note from an examination of the affidavit of counsel for the plaintiff submitted in opposition to the defendant's motion to dismiss the complaint that no question concerning the truthfulness or conclusiveness of the "Rules" was ever raised in the court at Special Term. (A182)

Appendix

A wide variety of documents have qualified as "documentary evidence" and therefore have been deemed sufficient to be the basis of a motion to dismiss under the CPLR 3211(a)1 and its predecessor statute, Rule 113 of the Rules of Civil Practice. See, *Heaney* v. *Purdy,* 29 N.Y.2d 157, 324 N.Y.S.2d 47 (1971) (where a judgment of an Ontario court was held sufficient documentary evidence for malicious prosecution); *Gauthier* v. *Gabel, supra* (where the court permitted the "documented legislative considerations" of a local rent control law, to be submitted in support of a motion to dismiss a complaint seeking a declaration that the law was invalid); *Diamond* v. *Davis,* 38 N.Y.S. 2d 412 (1st Dep't 1942), aff'd 292 N.Y. 552 (1944) (where copies of corporate records, official documents on file with the SEC, and photostatic copies of New Jersey statutes were deemed sufficient documentary evidence to support a motion to dismiss); *Chance* v. *Guaranty Trust Co.,* 173 Misc. 754, 20 N.Y.S.2d 635, 638 (Sup. Ct., Kings Cty. 1939), aff'd 257 A.D. 1006, 13 N.Y.S.2d 785 (2d Dep't 1939), aff'd 282 N.Y. 656 (1940) (where resolutions, voucher entries, contracts, bonds and mortgages relating to fixing dates of the transactions complained of were deemed sufficient to support a motion to dismiss); *Levine* v. *Behn, supra* (where court decisions of related cases, the various pleadings, the extracts from the minutes of directors meetings and other written documents such as letters, demands, receipts and releases were deemed competent documentary evidence).

In light of the liberal interpretation courts of this state have accorded "documentary evidence" and the broad range of documents found competent to support a motion to dismiss pursuant to CPLR 3211(a)1, the plaintiff's argument below was without merit.

c. ***There Is No Requirement Under The CPLR That Documents Must Be "Official" In Order To Support A Motion To Dismiss.***

The trial court based its decision to dismiss the complaint on a finding that the "Rules of the Government of the Democratic Party of Kings County" were the type of documentary evidence contemplated by CPLR 3211(a)1. Contrary to the unsupported claims raised by the plaintiff below, under Rules 3211(a)1, documentary evidence, quite simply, may take the form of any writing. As has been cogently stated by a noted authority on the law of evidence:

> Documentary evidence is evidence in the form of a writing or writings (citations omitted)... A document is "any substance having any matter expressed or described upon it by marks capable of being read" and when "produced for the inspection of the court . . . such documents are called documentary evidence" (citation omitted).

Richardson on Evidence, §2 (10th ed. Prince rev. 1973).

There is absolutely no foundation in the law, or in logic for that matter, to support the plaintiff's argument below that the documents presented by the defendant were insufficient to form the basis for a motion to dismiss because they were not "official".

Even under Rule 113 of the former Rules of Civil Practice an "official" document was not required to support this motion. Indeed, the Rule authorized summary judgment for a defendant in an action if a defense "sufficient as a matter of law" was "founded upon facts established prima facie by documentary evidence or official record". Official

records were included in the rule only as an alternative; official records were not required but were permissible.

Despite the lack of any requirement that documents be "official", the proffered documents truly have all the indicia of what would make a document official. The "Rules for the Government of the Democratic Party of Kings County" were adopted by the Democratic Committee pursuant to the legislative mandate of section 2-114 of the New York State Election Law. Section (1) provides, in relevant part:

> Each committee may prepare rules for governing the party within its political unit . . . within 10 days after the adoption of any Rule or amendment thereto a certified copy thereof shall be filed . . . by the county committee in the office of the State Board of Elections, and in the office of the Board of Elections of the County. . . No rule or amendment thereof shall be effective until the filing thereof in the office of the State Board of Elections.

It is beyond question that once rules are adopted by a committee, they remain the rules of the committee until amended; they must be obeyed and, most importantly, they must be enforced by the courts. *Battipaglia* v. *Executive Committee of Democratic County Committee,* 20 Misc.2d 226, 191 N.Y.S.2d 288 (Sup. Ct. Queens Cty. 1959); *Davie* v. *Riesner,* 13 Misc.2d 1019, 178 N.Y.S.2d 740 (Sup. Ct., N.Y. Cty. 1958). Indeed, courts of this state are required, without request, to take judicial notice of the "Rules for the Government of the Democratic Party". CPLR 4511a. Since the term "official documents" is not defined by statute, what constitutes an official document must be judicially determined on an *ad hoc* basis. It is respectfully asserted that

a court would be fully warranted in finding the "Rules" to be in fact "official documents".

Accordingly, the plaintiff's claim that the Rules are not competent documentary evidence within the meaning of CPLR 3211(a)1 should be rejected.

d. *The Party Rules Establish,* Prima Facie, *A Complete Defense To The Complaint.*

A defense is sufficient as a matter of law, to sustain the dismissal of a complaint, if it is founded on facts established *prima facie* by documentary evidence. *Diamond* v. *Davis, supra; Levine* v. *Behn, supra;* 4 J.B. Weinstein, Korn, Miller, *New York Civil Practice, supra,* at 3239. Where the plaintiff fails to show facts sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence, the motion to dismiss must be granted. *Lederer* v. *Wise Shoe Co.,* 276 N.Y. 459, 12 N.E.2d 544 (1938). Mere unsupported accusations will not suffice.

Accordingly, plaintiff's claim that the documentary proof relied upon by the lower court was insufficient or incompetent, must be rejected.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the order of the Appellate Division, First Department, should be reversed and that the order of Special Term, dismissing the complaint underlying this action, should be reinstated.